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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No.

HARRY C. SCHWARTZ AND ABRAHAM SIEGEL,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

OPINIONS BELOW.

The opinion of the Court of Quarter Sessions of Philadelphia County denying Petitioners' motions in arrest of judgment and for new trials is unreported and is printed at pages 1b to 25b[1] of the Appendix hereto. The opinion of the Superior Court of Pennsylvania affirming the judgments of sentence entered by the Court of Quarter Sessions of Philadelphia County is reported at 210 Pa. Super. 360, 233 A. 2d 904, and is printed at pages 29b to 49b of the

Appendix hereto. The per curiam opinion of the Supreme Court of Pennsylvania affirming the order of the Pennsylvania Superior Court and the dissenting opinions of Justices Roberts and Cohen, are reported at 432 Pa. 522, 248 A. 2d 506, and are printed at pages 56b to 58b of the Appendix hereto. The per curiam order of the Pennsylvania Supreme Court denying Petitioners' application for reargument is not reported and is printed at page 69b of the Appendix hereto.

JURISDICTION.

The original order of the Pennsylvania Supreme Court was entered on November 14, 1968; the order denying Petitioners' application for reargument was entered on January 8, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

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1. References followed by the letter "b" are to the Appendix to this Petition; those followed by the letter "a" are to the certified printed record of the proceedings in the Court of Quarter Sessions of Philadelphia County, which is being filed concurrently herewith.

QUESTIONS PRESENTED.

1. Did the admission into evidence at Petitioners' joint trial of the unsworn statement of Petitioner Harry C. Schwartz inculpating Petitioner Abraham Siegel constitute a violation of Petitioners' constitutional rights under the Due Process Clause of the 14th Amendment to the United States Constitution and under the Sixth Amendment of the United States Constitution?

2. Did the conviction of Petitioner Harry C. Schwartz of the common-law offenses of misbehavior in office, official oppression and malfeasance as a Magistrate of the City of Philadelphia on the basis of his disposing of valid small claims brought before him by a collection agency in which his wife was an officer and stockholder, which conduct had not theretofore been declared criminal by statute or by judicial precedent, constitute a violation of Petitioner's constitutional rights under the Ex Post Facto and Due Process Clause of the United States Constitution?

3. Did the affirmance by the Pennsylvania Supreme Court of Petitioners' conviction by a divided vote of 3-3, although Petitioners' appeal to that tribunal had been argued before a full constitutional court of seven, violate Petitioners' constitutional rights under the 14th Amendment to the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED.

The first paragraph of Article I, Section 10 of the United States Constitution provides in pertinent part as follows:

> "Sec. 10. No State shall . . . pass any . . . ex post facto Law. . . ."

The second sentence of Section 1 of the 14th Amendment to the United States Constitution provides in pertinent part as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process or law. . . ."

The 6th Amendment to the United States Constitution provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

Article V, § 2 of the Pennsylvania Constitution (as effective prior to January 1, 1969)[2] provides as follows:

> "The Supreme Court shall consist of seven judges, who shall be elected by the qualified electors of the State at large . . . ."

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2. On April 23, 1968, the citizens of Pennsylvania adopted an entirely new judiciary article to the Pennsylvania Constitution which became effective January 1, 1969. Section 2 of this Article also provides for a Supreme Court consisting of seven judges.

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STATEMENT OF THE CASE.

This Petition arises out of the conviction of Petitioners in the Court of Quarter Sessions of Philadelphia County, Pennsylvania (now Court of Common Pleas of Philadelphia County, Criminal Trial Division), of various offenses relating to their conduct in office, as Magistrate in the case of Harry C. Schwartz, and as Constable in the case of Abraham Siegel. Defendants were sentenced on December 14, 1966 to serve terms of imprisonment of 11 to 23 months in the Philadelphia County Jail and to pay fines in the total amount of $10,000 in the case of Magistrate Schwartz and $5,000 in the case of Constable Siegel (27b-28b). The judgments of sentence entered in the trial court were affirmed on appeal by the Pennsylvania Superior Court and by an equally divided Pennsylvania Supreme Court. Review is now sought in this Court.

The state court proceedings had their beginnings in the special probe of the Philadelphia magisterial courts conducted by the Attorney General of Pennsylvania during the fall and winter of 1964-65. On January 26, 1965, as part of the probe, Magistrate Schwartz, alone and unrepresented, and without having been advised of his rights to obtain counsel or to remain silent, was subjected to intensive questioning by two Special Assistant Attorney Generals concerning the operation of his court. This interrogation, which was not under oath, lasted from approximately 1:30 P. M. in the afternoon until 8:30 P. M. at night, without recess for dinner.

Thereafter, on January 17 and 18, 1966, on the basis of the evidence obtained during the investigation, Petitioners were indicted by the Grand Jury on a total of twenty-one bills of indictment (17a-41a). Magistrate Schwartz was charged with the common-law offenses of misbehavior in office, official oppression and malfeasance (20a-25a), and both Petitioners with the offense of obtaining money by

false pretenses and conspiracy, all arising out of the disposition of certain specified cases brought before Magistrate Schwartz by Constable Siegel and the Active Collection Agency (hereinafter referred to as "ACA"). The basic accusation against Magistrate Schwartz was that he acted improperly by sitting in judgment in these cases with knowledge that his wife was an officer and a principal stockholder of ACA. The false pretense bills were based upon the allegations that Constable Siegel wrongfully added to the claims involved in these cases interest, costs and other sums which he knew to be illegal or unauthorized, and that Magistrate Schwartz also had knowledge of these additional items and that they were illegal or unauthorized.

Petitioners moved to quash the Bills of Indictment for various reasons, including the indefiniteness of the common-law Bills as against Magistrate Schwartz (44a). The Court for the most part, denied Petitioners' motions, although six of the fifteen original false pretense Bills were quashed prior to trial because barred by the Statute of Limitations. An additional Bill was dismissed for lack of evidence at the end of the trial.

Petitioners were tried together in a joint trial before the Honorable John J. McDevitt and a jury from April 12 to 20, 1966. At the outset of the trial, Constable Siegel moved for a severance, which was denied (181a-82a). Later both defendants moved to suppress the Commonwealth's evidence against them, including the transcribed notes of the interrogation of Magistrate Schwartz, on the ground that the evidence was unlawfully obtained.[3] These motions

3. Petitioners had moved to suppress the evidence on these grounds prior to their indictment (3a-5a) and a hearing was held with respect thereto before the Honorable Stanley Greenberg, Judge of the Court of Common Pleas of Philadelphia County (109a-78a). Judge Greenberg denied the motions to suppress, but left open for later disposition any question regarding the admissibility of particular evidence, including Magistrate Schwartz' statement, obtained as a result thereof (14a-16a).

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were also denied by the trial judge (50a-56a).[4]

The principal evidence introduced at the trial concerned the handling and collection of a number of small claims by Constable Siegel and ACA. In general, the claims had been referred to ACA by the Philadelphia Credit Bureau on behalf of the original creditor. These accounts were referred to ACA only after both the Philadelphia Credit Bureau and the original creditor had failed in their attempts to recover the amounts due.

In all of the instances presented to the jury, Constable Siegel, in order to collect the debt, was required to secure the issuance of a summons notifying the debtor to appear for a hearing before Magistrate Schwartz. Some of the debtors appeared, others did not. In these specific cases the Magistrate simply entered "judgment" against the debtor. The actual amount of the judgment, namely the debt claimed by Constable Siegel on behalf of ACA to be owed the creditor, was then entered by the clerk in the court dockets. The amount generally included the principal debt, interest in the amount of $1.50, $2.50, $3.50 or $4.50 and costs of $7.50 or $9.00.

There was testimony that ACA had not been requested to collect interest on these claims and that the proper amount of costs allowable for service of summons was $5.00 plus mileage. The Court refused to permit cross-examination or the introduction of evidence as to the custom among constables, and its approval by public officials, to impose additional charges, including the amounts of $7.50 (for one defendant) and $9.00 (for two defendants) as costs for service of summons to show lack of criminal intent on behalf of Constable Siegel in collecting these amounts.

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4. Judge McDevitt's opinion is reported at 39 D. & C. 2d 607 (1966).

The total amount of the over-charges involved in the four instances set forth in the bills of indictment charging false pretenses was $24.00.

Magistrate Schwartz' connection with the above acts was based upon evidence that prior to his election as Magistrate in 1960 he had been a constable himself, had appointed Constable Siegel as deputy constable, and had operated ACA as a sole proprietorship; that the business was incorporated immediately after his election; and that his wife, Lillian, was a principal shareholder, together with Constable Siegel, in the corporation (182a-93a). There was also read into the record excerpts from the statement made by Magistrate Schwartz during his examination by the Special Assistant Attorneys General with regard to his relationship with Constable Siegel and ACA (819a-41a, 70b-79b). The Court admitted this evidence, over the objection of both Petitioners (919a-20a, 70b), although instructing the jury that "the information contained in the transcript may not be considered or used in any respect against Constable Siegel, even though Constable Siegel's name may appear from time to time in it" (804a).

The fourteen remaining indictments were presented to the jury on the above evidence, and on April 20, 1966, the jury returned a verdict finding defendants guilty as charged on all of the bills.

Petitioners thereupon filed motions in arrest of judgment and for new trial in which Magistrate Schwartz alleged, inter alia, that "the charges of which defendant was convicted are unconstitutionally vague and indefinite" and that "the defendant was improperly convicted of common law crimes" (65a) and in which Constable Siegel alleged, inter alia, that "the Court erred in refusing to grant the defendant a trial severance" (79a). The basis for Constable Siegel's contention in this respect was that he was prejudiced by the introduction into evidence of Magistrate

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Schwartz' statement and that he was entitled, as a matter of fairness and due process, to a separate trial free from the effect of such damaging evidence.

These motions were dismissed by the court en banc on December 7, 1966, in an opinion written by the trial judge, Judge McDevitt, which expressly rejected the constitutional questions raised by Petitioners in the allegations recited above (7b-10b, 15b-16b).

These same constitutional questions were presented on appeal to the Pennsylvania Superior and Supreme Courts (53b-54b) and were likewise rejected (38b-42b, 48b-49b). The appeal in the Pennsylvania Supreme Court was argued before all seven judges then constituting the Court on January 9, 1968. No decision was rendered, however, until November 14, 1968, when the Court filed a per curiam opinion, stating "The Court, being equally divided, the order of the Superior Court is affirmed" (56b). The opinion further noted that Mr. Justice Musmanno, who had died on October 12, 1968, and who sat with the Court at the time of oral argument, "did not participate in the decision of this case" (ibid), causing the equally divided Court. Dissenting opinions were filed by Mr. Justice Cohen and by Mr. Justice Roberts, in which Mr. Justice O'Brien joined. The dissent of Justice Roberts and Justice O'Brien was expressly based upon this Court's decisions in *Bruton v. United States*, 391 U.S. 123 (1968) and *Roberts v. Russell*, 392 U.S. 293 (1968), which were decided on May 20 and June 10, 1968, respectively, during the pendency of this appeal before the Pennsylvania Supreme Court. It was their opinion that the introduction into evidence of Magistrate Schwartz' statement implicating his co-defendant deprived Petitioners of their constitutional rights to due process and required the granting of new and separate trials.

Petitioners immediately filed a Petition for Reargument with the Pennsylvania Supreme Court alleging that

the Court's decision was directly contrary to the intervening decisions of this Court in *Bruton* and *Roberts*, and that they were entitled, as a matter of due process, to have the matter determined by the full constitutional seven judge Court and a decision thereon rendered by a full four judge constitutional majority (59b-69b). In particular, Petitioners requested an opportunity to argue the effect of the *Bruton* and *Roberts* cases, which were handed down subsequent to the oral argument on Petitioners' appeals and to argue the novel constitutional issues raised by the three to three division of the Court. This petition was denied by the Court in a per curiam opinion on January 8, 1969 (69b).

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REASONS FOR ALLOWING WRIT.

1. The decision of the Pennsylvania Supreme Court affirming the conviction of Petitioners at a joint trial at which there was introduced into evidence a statement by Magistrate Schwartz inculpating his co-defendant Constable Siegel in violation of Petitioners' rights to due process of law under the 14th Amendment to the United States Constitution is directly contrary to the decisions of this Court in *Bruton v. United States*, 391 U. S. 123 (1968) and *Roberts v. Russell*, 392 U. S. 293 (1968) and must be overruled.

2. The decision of the Pennsylvania Supreme Court implicitly holding that the conviction of Petitioner Harry C. Schwartz of the common-law offenses of misbehavior in office, official oppression and malfeasance on the basis of his sitting in judgment on the ACA claims with knowledge that his wife was an officer and stockholder of ACA did not violate the Petitioner's rights to due process of law under the 14th Amendment to the United States Constitution, although this conduct had not theretofore, in the 200 year history of the magisterial system, been declared criminal by statute or by judicial precedent, is contrary to the principles enunciated by this Court in *Bouie v. City of Columbia*, 378 U. S. 347, 352-54 (1964), and constitutes a determination of a substantial federal constitutional issue not previously ruled upon by this Court.

3. The decision of the Pennsylvania Supreme Court implicitly holding that the affirmance of Petitioners' convictions by a three-to-three vote of less than all of the seven judges comprising the Court and hearing the argument thereon did not violate Petitioners' rights to due process of law under the 14th Amendment to the United States Constitution constitutes a determination of a substantial federal constitutional issue not previously ruled upon by this Court.

1. The Decision of the Pennsylvania Supreme Court Is Directly Contrary to the Decisions of This Court in Bruton v. United States and Roberts v. Russell.

At the very outset of the trial in the state court, Petitioner Abraham Siegel, knowing that the Commonwealth intended to introduce into evidence the statement of his co-defendant, Harry C. Schwartz, moved for severance of the joint trial. This motion was denied and the Commonwealth did in fact introduce the transcribed notes of Magistrate Schwartz' interrogation as an exhibit and had portions thereof read into the record before the jury (70b-79b).

During the course of the statement, Magistrate Schwartz continually referred to Constable Siegel and their mutual relationship. In particular, there was read to the jury portions of the statement in which Magistrate Schwartz noted that Constable Siegel's compensation from ACA had increased greatly after his own election as Magistrate and that it was Constable Siegel, not the creditor, who added interest "merely to try to collect the claim" (74b-75b, 77b-78b) These excerpts clearly had the effect of inculpating Constable Siegel in a conspiracy with Magistrate Schwartz as charged to use their public offices for the purpose of self-enrichment and were obviously prejudicial to the conduct of his defense, despite the trial court's instructions to the jury not to consider the statement with regard to Constable Siegel. Since Magistrate Schwartz did not take the stand, Constable Siegel had no way of confronting the author of these damaging comments so as to refute their implications. Under these circumstances, the refusal of the state courts to grant Constable Siegel a separate trial deprived him of his right to due process of law under the 14th Amendment to the United States Constitution and was directly contrary to the teachings of this Court in *Bruton v. United States, supra* and *Roberts v. Russell, supra.*

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In *Bruton,* the Court held that the introduction into evidence at a joint trial of the statement of one codefendant which inculpates a second defendant constitutes a violation of the second defendant's right of confrontation under the 6th Amendment to the United States Constitution. The opinion expressly repudiated the rule of *Delli Paoli v. United States,* 352 U. S. 232 (1957), relied upon by the lower state courts, that statements of this sort were admissable provided that the jury was instructed to disregard the statement as to the second defendant (391 U. S. at 135-37):

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant . . . are deliberately spread before the jury in a joint trial . . .
>
> "[I]n the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all."

In *Roberts,* the Court held that the constitutional principles enunciated in *Bruton,* a federal court proceeding, were equally applicable to *state* court proceedings under the Due Process Clause of the 14th Amendment to the United States Constitution, and were further applicable *retroactively* to criminal trials conducted prior to the *Bruton* opinion. These decisions require the reversal of

the judgments below and the grant of new and separate trials to both Petitioners.

This is obviously true as to Constable Siegel. It is equally so as to Magistrate Schwartz. Under *Bruton* and *Roberts,* the prosecution has the choice of trying two or more defendants jointly and foregoing the use of statements derived from any of them, or trying them separately and utilizing the statement of one of the defendants in his own trial. In the instant case, the Commonwealth did both and thereby gained the illegal advantage over Magistrate Schwartz of the admissibility of the statement, as well as the inferences resulting from the joint trial with the defendant, Abraham Siegel, who was alleged to have actively conducted the collection business which was the crux of the Commonwealth's case.

Certainly the conduct of Magistrate Schwartz' defense was seriously prejudiced by the presence of both of these factors. The statement was the principal item of evidence against him; it provided proof of the vital elements of the Commonwealth's case against the Magistrate otherwise missing from the evidence. If it had been excluded, there would not have been sufficient evidence to support Magistrate Schwartz' conviction; if there had been a separate trial, his strategy in counteracting its effect could have been different. Thus, it is clear that Magistrate Schwartz' constitutional right to due process and a fair trial, as well as Constable Siegel's, were violated as a result of the procedure followed in this case, and that he, too, is entitled to a reversal under the doctrine of the *Bruton* and *Roberts* cases.

The decisions in both *Bruton* and *Roberts* were handed down during the pendency of Petitioners' appeals before the Pennsylvania Supreme Court, after oral argument but before that Court's disposition thereof. Although Peti-

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tioners did not have an opportunity to brief and argue the effect of these cases, the Court was aware of their existence and that they overruled the precedents (*e.g., Delli Paoli v. United States, supra*) relied upon by the lower courts in rejecting Constable Siegel's request for severance. The dissenting opinion of Mr. Justice Roberts expressly pointed out to the Court that *Bruton* and *Roberts* rendered the procedure followed in the instant trial constitutionally defective. The affirmance of Petitioners' convictions despite this clear warning is contrary not only to the cited decisions of this Court, but to the decisions of the many federal and state courts,[5] including the Pennsylvania Superior Court,[6] which have set aside convictions obtained under the same invalid procedure. For this reason alone, it is submitted, a writ of certiorari should be issued to review the order of the Pennsylvania courts in the instant matter.

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5. *People v. Barrett*, 267 Cal. App. 154, 72 Cal. Reptr. 681 (2d Dist. 1968); *Gelis v. State*, 215 So. 2d 86 (Fla. Ct. App., 2d Dist. 1968); *Branch v. State*, 212 So. 2d 29 (Fla. Ct. App. 2d Dist. 1968); *People v. Miller*, 238 N. E. 2d 407 (Ill. 1968); *People v. Scott*, 100 Ill. App. 2d 473, 241 N. E. 2d 579 (1st Dist. 1968); *Smithson v. State*, 5 Md. App. 378, 247 A. 2d 543 (1968); *People v. Boone*, 22 N. Y. 2d 476, 293 N. Y. S. 2d 294, 239 N. E. 2d 885 (1968); *People v. Jackson*, 22 N. Y. 2d 446, 293 N. Y. S. 2d 268, 239 N. E. 2d 869 (1968); *People v. Bastone*, 30 A. D. 2d 828, 293 N. Y. S. 2d 709 (2d Dep't. 1968); *People v. Weis*, 30 A. D. 2d 877, 292 N. Y. S. 2d 986 (2d Dep't. 1968); *People v. Burwell*, 30 A. D. 2d 842, 292 N. Y. S. 2d 965 (2d Dep't. 1968); *People v. Cassidy*, 30 A. D. 2d 795, 291 N. Y. S. 2d 822 (1st Dep't. 1968); *United States ex rel. Johnson v. Yeager*, 399 F. 2d 508 (3d Cir. 1968) (N. J.); *United States ex rel. Joseph v. LaVallee*, 290 F. S. 90 (N. D. N. Y. 1968) (N. Y.); *Townsend v. Henderson*, 405 F. 2d 324 (6th Cir. 1968) (Tenn.); *Serro v. United States*, 401 F. 2d 989 (D. C. Cir. 1968); *United States v. Kelly*, 399 F. 2d 692 (3d Cir. 1968); *Atwell v. United States*, 398 F. 2d 507 (5th Cir. 1968); *United States v. Lyon*, 397 F. 2d 505 (7th Cir. 1968).

6. *Commonwealth v. Bosman*, 213 Pa. Super. 258, 247 A. 2d 647 (1968).

2. The Decision of the Pennsylvania Supreme Court Is Contrary to the Decision of This Court in Bouie v. City of Columbia.

Throughout these proceedings, Magistrate Schwartz has contended that Bills of Indictment Nos. 881-883 and 885 were unconstitutionally vague and indefinite and that his conviction thereon violated the due process and ex post facto clauses of the United States and federal constitutions. These Bills charged Magistrate Schwartz with committing the common-law offenses of misbehavior in office (Bill Nos. 881 and 882), official oppression (Bill Nos. 881 and 883) and malfeasance (Bill Nos. 881 and 885):

> ". . . by wilfully, knowingly and corruptly issuing civil summonses and sitting in judgment upon the civil cases set forth and at the dates set forth in the attached list, with the knowledge that his wife, Lillian Schwartz, was an officer and principal owner of the Active Collection Agency, Inc., which then and there was the collection agency or subagent of the various creditors of said claims, would obtain a direct pecuniary benefit from the results of the said cases by receiving a commission on all judgments and costs paid by the alleged debtors and that he, therefore, would indirectly benefit thereby."

The principal defect in these allegations is the total lack of any statutory or judicial precedent prohibiting a magistrate from disposing of a case in which his wife has an indirect interest such as that alleged herein. This is the first occasion such conduct has been considered criminal, despite the 200 year history of the magisterial system in the City of Philadelphia and the numerous legislative efforts which have been made to correct the abuses

therein: Act of May 10, 1927, P. L. 866, 42 P. S. §§ 1041-74; Act of June 15, 1937, P. L. 1743, 42 P. S. §§ 1101-47; Act of May 9, 1949, P. L. 1028.

Both the Trial court (9b) and the Pennsylvania Superior Court (42b)[7] conceded that there was no legislative or judicial precedent pertaining to Magistrate Schwartz' conduct in sitting in the ACA cases, but nonetheless upheld the conviction on these charges as an extension of old common-law crimes to new conduct. In other words, the state courts, unable to find an established crime, whether statutory or common law, to fit the facts of this case, *retroactively* created a new crime which did. It is submitted that this judicial legislation of criminal law was constitutionally improper under the principles promulgated by this Court in *Bouie v. City of Columbia, supra.*

The *Bouie* case concerned the conviction of two negro college students under the South Carolina criminal trespass statute as a result of a sit-in demonstration at a drugstore lunch counter. The statute prohibited the "entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry. . . ." It was conceded that the defendants had not been notified that their presence in the restaurant area was prohibited prior to their entry therein, although they admittedly refused to leave when requested to do so. Their conviction was affirmed, however, by the South Carolina Supreme Court on the

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7. The Superior Court, in passing, did refer to the Act of March 30, 1875, P. L. 35, § 1, as amended, 12 P. S. § 111, which provides for a change of venue when the judge, or a near relative of the judge, is a party to a suit or is personally interested in the event thereof. This act pertains solely to venue, and has no relation whatsoever to criminal responsibility. It is inapplicable, moreover, to situations such as involved herein where the relative is merely acting as an agent or as counsel, or where the relationship is by affinity rather than by consanguinity. 20 Pennsylvania Law Encyclopedia, Judges, § 45, and cases cited therein.

basis of a judicial construction, adopted by the court in a companion case, extending the coverage of the statute to the act of remaining on the premises of another after receiving notice to leave. The defendants contended (378 U. S. at 350):

> ". . . that by applying such a construction of the statute to affirm their convictions in this case, the State has punished them for conduct that was not criminal at the time they committed it, and hence has violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits. . . ."

This Court agreed (378 U. S. 351-52):

> "It is true that in the . . . typical applications of the principle, the uncertainty as to the statute's prohibition resulted from vague or overbroad language in the statute itself, and the court concluded that the statute was 'void for vagueness.' The instant case seems distinguishable, since on its face the language . . . of the South Carolina Code was admirably narrow and precise. . . . The thrust of the distinction, however, is to produce *a potentially greater deprivation of the right to fair notice in this sort of case, where the claim is that a statute precise on its face has been unforeseeably and retroactively expanded by judicial construction,* than in the typical 'void for vagueness' situation. . . . When a statute on its face is narrow and precise, however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively brought within it by an act of judicial construction. . . .

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"*There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.* As the Court recognized in Pierce v. United States, 314 U. S. 306, 311, 'judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.' Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot 'be cured in a given case by a construction in that very case placing valid limits on the statute' . . . ." (Emphasis added.)

These principles are equally applicable to the instant case. The common-law crimes alleged herein, such as official oppression, are so vague and indefinite in description that they do not, without prior judicial application to specific conduct, inform the public as to the nature of the acts prohibited thereby and this defect is aggravated, not cured, by the judicial extension to conduct not theretofore proscribed. *If the judicial expansion of a precisely worded criminal statute poses "a potentially greater deprivation of the right to fair notice" than the judicial application of a vaguely worded statute, how much more the deprivation where there is not even a statute to begin with.* Surely, in the absence of a statute, or judicial precedent, there is an even greater likelihood that a potential defendant will be lulled "into a false sense of security" that his conduct will not be retroactively circumscribed.

This is particularly true here. The transfer by Magistrate Schwartz, immediately after his election, of his ownership in ACA to a corporation in which his wife was a

stockholder and officer, a matter of public record, evidences his good faith belief that he was divesting himself of any improper interest he may have had in a possible litigant in his court. There was no standard at that time by which he could judge that any more was required of him; none, we submit can be retroactively established by the courts.

As this Court noted in *Bouie* (378 U. S. 353-54):

> "[A]n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids . . . an *ex post facto* law has been defined by this Court as one 'that makes an action done before the passing of the law, and which was innocent when done, criminal. . . . If *a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.* Cf. *Smith v. Cahoon*, 283 U. S. 553, 565. The fundamental principle that 'the required criminal law must have existed when the conduct in issue occurred,' . . . must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures. If a judicial construction of a criminal statute is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect. . . ." (Emphasis added.)

This principle, invalidating the creation of new crimes by judicial interpretation of legislation must, *a fortiori*, restrict the judicial creation of new common-law crimes. Clearly then, the decision of the Pennsylvania Supreme Court in affirming such judicial legislation by the trial court

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is in conflict with the basic premise underlying this Court's opinion in *Bouie*. At the very least, the conclusion of the state courts that Magistrate Schwartz' conviction did not violate his right to due process in this respect constitutes a determination of a substantial, and novel, federal constitutional question which should be determined by this Court.

3. The Affirmance of Petitioners' Convictions by a Divided Three-to-Three Vote of the Pennsylvania Supreme Court Violates the Due Process Clause of the 14th Amendment.

Article V, § 2 of the Pennsylvania Constitution[8] provides that the Supreme Court of Pennsylvania "shall consist of seven judges". Petitioners' appeals were argued to the Court on January 9, 1968 before all seven judges then constituting the Court, and they are entitled to have the matter decided by the *full court*. There is no provision in the State Constitution or statutes authorizing the Court to act with less than seven judges or to render a decision other than by a majority vote of four. In particular, there is no authority permitting the Court to affirm a criminal conviction by an evenly divided vote.

On the contrary, the principles of due process and the presumption of innocence which underlie our criminal procedure preclude the affirmance of the judgments in this criminal matter by a divided vote. The Commonwealth has the burden in a criminal matter of proving the factual elements of guilt beyond a reasonable doubt. *Morrison v. People of State of California*, 291 U. S. 282, 288-89 (1933); *Speiser v. Randall*, 357 U. S. 521, 523-24 (1958); *Brooks v. United States*, 164 F. 2d 142 (5th Cir. 1947). This is a

8. Although Article V of the Pennsylvania Constitution was completely revised effective January 1, 1969, the provision as to the number of justices constituting the Court remained unchanged. See Note 2, *supra*.

burden which continuously remains on the Commonwealth until final adjudication by a court of last resort. Thus, the Commonwealth should have the burden of convincing a constitutional majority of the appellate court that there is no legal deficiency, in substance or in procedure, with respect to the verdict reached by the jury.

This issue clearly could not have been anticipated prior to the decision of the Pennsylvania Supreme Court and therefore was not briefed nor argued before that Court. It was presented to the Court by way of a Petition for Reargument (59b-69b), almost immediately after Petitioners received notice of the Court's original decision. The Court's rejection of this Petition, without further argument, also constitutes a determination of a novel federal constitutional issue which should be ruled upon by this Court.

CONCLUSION.

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

MARVIN COMISKY,
EDWIN P. ROME,
GONCER M. KRESTAL,
Four Penn Center Plaza,
Philadelphia, Penna. 19103,
Attorneys for Petitioners.

Of Counsel:
BLANK, ROME, KLAUS & COMISKY.

APPENDIX.

OPINION AND ORDER SUR MOTIONS IN ARREST OF JUDGMENT AND NEW TRIAL.

(Both cases.)

Before McDevitt, *P. J.*; Barbieri, *J*; and Spaeth, *J.*

Defendants, Abraham Siegel and Harry C. Schwartz, were arrested, indicted, tried and found guilty on a variety of charges all arising out of the investigation of the Magistrates' Courts in the City of Philadelphia, which was completed in April 1965. Several issues are raised by defendants on these Motions which will be considered and disposed of. The principal charge is that these defendants conspired together to commit certain acts which resulted in an abuse of the powers of their respective offices.

The evidence, in view of the verdicts against both defendants (*Commonwealth v. Reginelli,* 208 Pa. Superior Ct. 344, 349 (1966)), established the following facts:

In 1954, Harry C. Schwartz was an elected Constable in the City of Philadelphia. On January 4, 1955, he appointed defendant, Abraham Siegel as Deputy Constable (N. T. 47). Siegel took the oath of office on February 14, 1955. Subsequently, and on November 5, 1957, Siegel was elected Constable, effective for six years from January 2, 1958 (N. T. 49). Defendant, Schwartz, was reelected as Constable on the same date, effective as of January 2, 1958 (N. T. 49).

Schwartz was thereafter appointed to serve as Magistrate of Court No. 11, effective as of December 23, 1960 (N. T. 50), and was elected to serve a full six-year term effective from January of 1962 (N. T. 50-51). Constable Siegel was again reelected to serve a six-year term effective from January of 1964.

At the time when defendant Schwartz was a duly elected Constable of the City of Philadelphia, and on January 20, 1954, he caused the name of Active Collection Agency to be registered as the name under which he would operate his collection business (N. T. 53, 54). On January 4, 1961, articles of incorporation were filed with and approved by the Secretary of the Commonwealth, incorporating Active Collection Agency, Inc. (N. T. 55). As of January 10, 1961, the officers of the corporation were: Lillian Schwartz, President; Sidney B. Goldstein, a Certified Public Accountant (N. T. 816), Secretary; and Abraham Siegel, Treasurer (N. T. 57).

Lillian Schwartz in and was at all times material to this case, the wife of defendant, Harry C. Schwartz (N. T. 57). Lillian Schwartz was not active in the operation of the collection business, although she received a substantial salary as President of the corporation (N. T. 89-94).

Before Schwartz was elected as a Magistrate, he did collection work for Philadelphia Credit Bureau (N. T. 71). Active Collection Agency, Inc. continued to do work for Philadelphia Credit Bureau, but in much larger volume (N. T. 86-94; 685-687).

On numerous occasions, defendant, Siegel made improper service of the summons (N. T. 273, 485, 489, 550, 594); improper service of execution and levy; or failed to make a levy of any kind (N. T. 557); and filled in as standard practice identical descriptions of property levied upon in his returns (See Commonwealth Exhibits C-6, 7, 14, 15, 16, 19, 23, 24, 26, 27). In the cases proved, certain amounts of money were added to the principal debt owed by the debtor. In each case, arbitrary amounts of interest were added (N. T. 234, 655, 708-719), which were pocketed by the collection agency and not paid to the creditor (N. T. 67, 75, 105-06). Siegel also added mileage fees without regard to

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actual mileage (N. T. 689-707), and notwithstanding that the "service" was often improperly made. In addition, in each case costs were imposed of $7.50 or $9.00, in direct contravention of the statutory fee of $2.50 (N. T. 581-589).

The nexus or connection between Schwartz and Siegel was proved by the following facts. Magistrate Schwartz had been a Constable prior to his election as a Magistrate. As a Constable he appointed Siegel as his Deputy Constable, and also operated the Active Collection Agency. Upon his elevation to the minor judiciary, Schwartz turned over the collection business to his wife, Lillian, and defendant Siegel, who continued on as a Constable. Schwartz, notwithstanding his wife's position in Active (she owned 75% of the voting and 65% of the preferred stock from the date of incorporation until the end of 1963; thereafter 50% of each and received a salary for 1961 of $5,200.00, which was increased to $18,785.94 in 1964) continued to sit in judgment on cases where the creditor was represented by Active Collection Agency, Inc. The inescapable conclusion is that the business of Active increased as a direct result of the relationship between Siegel and Schwartz. Significantly, although Mrs. Schwartz was president and principal stockholder of Active, and received until 1964, a substantially greater proportion of the profits by way of what was called salary, she actually contributed no actual work or effort to the collection business (N. T. 819). Defendant Siegel was, for all practical purposes, Active Collection Agency, Inc. Philadelphia Credit Bureau's representative testified he dealt directly with Siegel (N. T. 475).

Although Active had its own office (N. T. 55), Siegel operated primarily out of Magistrate Court No. 11. In virtually every case testified to by Magistrate Schwartz's Clerk, the docket or daybook contained only the name of

the parties, address of defendant, $2.50 for costs, summons number, date of issuance and return date (N. T. 492-509). To ascertain the other information about the disposition of cases before Magistrate Schwartz, it was necessary to examine the so-called "jackets" in which the suit papers and other documents were kept (N. T. 492-509). On the face of these jackets appeared the notation "judgment", and amounts corresponding to the principal debt, interest and costs (N. T. 506-507). Notations in the dockets or day-books were made by the Magistrate's Clerk (N. T. 508), however notations on the jackets were made by the Constable (N. T. 522).

In at least one case, Magistrate Schwartz entered a judgment where the debt due exceeded $100.00, the limit of his civil jurisdiction (N. T. 467-468; 484-489). Interest and costs added to the judgment increased the debtor's liability from $105.36 to $129.60 (N. T. 489).

The pattern of Siegel's conduct was that he would receive an IBM card or notice of claim with the name and address of the debtor, the amount of the real debt and the date of the last communication or payment by the debtor. Siegel would then add to the claim an arbitrary sum for interest (N. T. 357-361, 722) and in some cases, without explanation, increased the amount of the real debt (N. T. 263-265; 444). A summons was then made out by Siegel (N. T. 327, 330-331), and after issuance by Magistrate Schwartz, service was made, often by mail rather than personally (N. T. 485, 489, 593, 594, 658) as required by law (N. T. 352-355) and on some occasions the summons was never actually served (N. T. 273, 550). This was followed by the entry of judgment by Schwartz in favor of the creditor (N. T. 421). Although by law the Constable is entitled to receive a fee of $2.50 plus $.10 per mile for service of the summons (N. T. 361), he was consistently awarded $5.00

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for one defendant and $6.50 for two defendants, without regard to the actual amount to which he was entitled and without regard to the improper service (N. T. 276, 459-460, 539). The Constable would fill in the amount of the debt on the summons after its issuance by Magistrate Schwartz (N. T. 327).

After judgment was entered, Schwartz permitted Siegel to send out writs of execution under his, Schwartz' name, but Schwartz never followed up Siegel's actions (N. T. 708-721). Siegel's levies were uniform in their impropriety—notices of levy and inventory of goods levied upon were prepared in Siegel's office and were all virtually identical. See Commonwealth Exhibits C-6, 7, 14, 15, 16, 19, 23, 24, 26, 27. Notices were either mailed to the debtor or left in the debtor's mailbox, without entry into the debtor's home. Siegel claimed and collected fees for this service which was improperly performed (N. T. 485, 489, 539, 660), and the fees claimed and collected did not conform to the statutory fee bill. The various creditors did not ask that interest be added or collected, and never received more than the real debt (N. T. 67, 75, 105-106). The creditor sometimes received less than the real debt even though it was actually collected in full (N. T. 536).

Finally, by Magistrate Schwartz' own admission, he was Active Collection Agency until he became a Magistrate (N. T. 815). Thereafter, he stated "*We* formed a corporation in that name immediately after I became a Magistrate" (N. T. 815). He also confirmed that his wife, Lillian Schwartz, retained the controlling interest in the corporation, although generally she did not perform any vital services for the business (N. T. 819). The tenor of the statements made by Schwartz clearly indicates that, even after he became a Magistrate, he regarded himself as being

in the collection business (N. T. 819-821). To make that even clearer, Schwartz said "I handle all this business for one reason. If my wife makes money, I'm going to benefit by it because I have an opportunity to spend some of the money she makes, being the president of the company that employs the Constable who handles the work."

On this state of the record, the defendants assert that the Commonwealth failed to make out a case. The basic charge against these defendants is that they conspired together to cheat and defraud, abuse and misuse their offices of public trust to personal advantage. The Penal Code Act of June 24, 1939, P. L. 872, § 302, 18 P. S. § 4302, provides:

> "Any two or more persons who falsely and maliciously conspire and agree to cheat and defraud any person of his moneys, goods, chattels or other property, or the prejudice of another, are guilty of conspiracy. . . ."

The conspiracy is the agreement, combination or common understanding, to do an unlawful act, or to do or commit a lawful act in an unlawful manner. *Commonwealth v. Rosen*, 141 Pa. Superior Ct. 272 (1940). The heart of the offense is the common understanding, no matter how it came into being. *Commonwealth v. Yobbagy*, 410 Pa. 172 (1963); *Commonwealth v. Neff*, 407 Pa. 1 (1962).

"Evidence to sustain a charge of conspiracy must be 'such as reasonably and naturally justifies an inference of guilt of the accused and is of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt. . . . A conviction will not be allowed to stand if it is based solely upon suspicions and conjectures. . . .'" *Commonwealth*

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v. Yobbagy, 410 Pa. 172, 176-77 (1963); *Commonwealth v. Evans*, 190 Pa. Superior Ct. 179, 201 (1955).

At the same time, the acts and conduct of the defendants themselves, done in pursuance of the original scheme, may be considered as proof of the unlawful intent, and the conspiracy may be established by proof of the relation, conduct or circumstances of the parties, *Commonwealth v. Smith*, 151 Pa. Superior Ct. 113, 116, 117 (1943). Otherwise stated, where the conduct of the parties indicates that they were acting together with a common and corrupt purpose in view, the jury may properly infer that a conspiracy did exist. *Commonwealth v. Albert*, 151 Pa. Superior Ct. 184 (1943); *Commonwealth v. Rosen*, 141 Pa. Superior Ct. 272 (1940).

We conclude that the evidence was of such quality and quantity as to prove, beyond a reasonable doubt, that Magistrate Schwartz and Constable Siegel did conspire together to commit the subversion of judicial process charged. It is inconceivable that these two defendants could have operated as closely together as they did, virtually sharing the same office facilities, and with such identity of purpose and design, without there having been a common understanding or agreement existing between them. *Commonwealth v. Cohen*, 203 Pa. Superior Ct. 34 (1964), cert. denied, 375 U. S. 985. The nexus or connection between these two defendants was much more concretely demonstrated than was the case in *Commonwealth v. Reginelli*, 208 Pa. Superior Ct. 344 (1966) and *Commonwealth v. Price*, 208 Pa. Superior Ct. 356 (1966).

Defendant, Schwartz, was also separately indicted and found guilty of the crimes of malfeasance and misbehavior in office and official oppression, and both defendants were found guilty of having obtained money by false pretenses.

Schwartz argues that the charges of official oppression, malfeasance and misbehavior in office are too vague and

indefinite and therefore may not be permitted to stand, citing *Bouie v. City of Columbia,* 378 U. S. 347 (1964); *Lanzetta v. New Jersey,* 306 U. S. 451 (1939); and *Chester v. Elam,* 408 Pa. 350 (1962).

Defendant further argues that there is no authority for holding as criminal, his conduct in sitting in judgment on cases wherein he has an indirect pecuniary interest. And to buttress this argument, in his brief defendant states "In not one of these cases was it alleged or shown that the debtor was not indebted to the creditor or that the adjudication against the debtor was otherwise improper." This is not so. (See e.g., N. T. 216-234; 257-291.)

Magistrate Schwartz asks this Court to assume, in the face of evidence and jury verdicts to the contrary, a complete separate identity between himself and Siegel and Lillian Schwartz. He also asks this Court to find as a matter of law that he cannot be implicated in Siegel's conduct. What the evidence revealed was a systematic scheme whereby Schwartz abused and misused his office as Magistrate, while attempting to remain within the strict letter of law applicable to his duties as a Magistrate. See, e.g., Act of March 30, 1875, P. L. 35, § 1, as amended, 12 P. S. § 111; Act of April 14, 1934, P. L. 333, § 37, 17 P. S. § 581, which require disqualification of a judge when the judge or a near relative is a party or is interested in the outcome, and Act of June 15, 1937, P. L. 1743, No. 368, § 3, 42 P. S. § 1103, which prohibits magistrates from engaging in any other business, and prohibits him from receiving money or other thing of value for the performance or nonperformance of his duties.

At the same time, Schwartz apparently seeks to absolve himself of responsibility because of his delegation of authority. Salzman, his clerk, kept Schwartz's books and said this was his responsibility (N. T. 322), and Siegel

made the notations on case jackets (N. T. 327, 330-331, 522-524). The responsibility for maintaining these records rests upon the Magistrate. Act of June 15, 1937, P. L. 1743, No. 368, §§ 6, 7 as amended, 42 P. S. §§ 1106, 1107.

The mere fact that there is no precise precedent, and no specific statute which makes Schwartz' conduct criminal does not bar indictment and conviction. See Kessler, Penna. Criminal Procedure, vol. 1, p. 170; Act of June 24, 1939, P. L. 872, § 1101, 18 P. S. § 5101. See also *Commonwealth v. Mohn*, 52 Pa. 243 (1866); *Commonwealth v. McHale*, 97 Pa. 397, 408-411 (1881); *Commonwealth v. Evans*, 190 Pa. Superior Ct. 179, 227, 228 (1959), aff'd, 399 Pa. 387, cert. denied, 364 U. S. 899, rehearing denied, 364 U. S. 939; *Commonwealth v. Cano*, 182 Pa. Superior Ct. 524, 532-536 (1956) (the rule invoked "is applicable only to such conduct which is inherently offensive to the public peace, morals, and economy, . . ."); *Commonwealth v. Mochan*, 177 Pa. Superior Ct. 454 (1955); *Commonwealth v. Peoples*, 148 Pa. Superior Ct. 595, 598-601 (1942), reversed on other grounds, 345 Pa. 576; *Commonwealth v. Brownmiller*, 141 Pa. Superior Ct. 107, 120-122 (1940); *Commonwealth v. DeGrange*, 97 Pa. Superior Ct. 181 (1929); *Commonwealth v. Miller*, 94 Pa. Superior Ct. 499 (1928); *Commonwealth v. Hartung*, 39 A. 2d 734 (Pa. Superior Ct. 1944); cf., *Commonwealth v. Neff*, 195 Pa. Superior Ct. 420 (1961), reversed for insufficiency of evidence, 407 Pa. 1; *Commonwealth v. Lawton*, 170 Pa. Superior Ct. 9 (1951).

Paraphrasing Judge Jacobs in *Commonwealth v. McKarski*, 208 Pa. Superior Ct. 376, 379 (1966), the question involved on these Motions is whether the acts charged in the indictments and proven to the satisfaction of the jury amount to offenses for which the perpetrator may legally be indicted and punished under the laws of this Common-

wealth. The Superior Court, quoting Judge Gawthrop in *Commonwealth v. Miller*, supra, at 507, said:

> "The common law is sufficiently broad to punish as a misdemeanor, although there may be no exact precedent, any act which directly injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrongdoer, as in the case of acts which injuriously affect public morality, or obstruct, or pervert public justice, or the administration of government."

See also, *Commonwealth v. Orris*, 136 Pa. Superior Ct. 137, 146 (1939); *Commonwealth v. Mack*, 111 Pa. Superior Ct. 494 (1934); *Commonwealth v. Sharpless*, 2 S. & R. 91 (1815).

We are of the opinion that the Commonwealth has proved and the jury found, such conduct on the part of this defendant as to represent a most outrageous and heinous obstruction and perversion of the judicial process. Under these circumstances, the convictions on indictments charging the common law offenses of official oppression, malfeasance and misbehavior in office, will not be set aside.

Both defendants were charged with obtaining money by false pretenses. The Penal Code defines this offense, in pertinent part, as follows:

> "Whoever, by any false pretense, . . . obtains from any . . . person any . . . money . . ., with intent to cheat and defraud any person of the same, or being an officer, manager, agent, employee of or in any way interested in any person, by false pretense, knowingly, and with intent to defraud, procures, obtains, or aids, assists, or abets in obtaining from any

other person, any . . . monies . . . for such person of which he is an officer, manager, agent, employee or in which he is in any way interested . . ." is guilty.

The cases are in agreement that three elements must be proved or co-exist to make out the crime. They are (1) a false pretense; (2) an intent to defraud; and (3) the obtaining of something of value. *Commonwealth v. Buzak*, 197 Pa. Superior Ct. 514 (1962); *Commonwealth v. Petrosky*, 194 Pa. Superior Ct. 94 (1961).

Four bills of indictment were returned against each defendant charging the offense of false pretense. They involved, respectively, the following debtors: Dorothy E. Eiseley, Kasmir Cybulski, Gustavius J. Huston and Bernard Granoff. The charge relates to the assessment of costs and interest by Constable Siegel. Siegel added interest to each of these debts, which he collected and credited to Active Collection Agency rather than the creditor. Further, as to each of these debtors, Siegel imposed improper costs, and charged costs where the service of process was not properly made. These monies were credited or paid to Active. Defendants had no right to any money collected in excess of that allowed by law, or in excess of that sought by the legitimate creditor. The Commonwealth proved in each of these cases that Siegel received money without warrant or authority of law, and in direct contravention of law. False charges were added to these claims, which were collected and pocketed by defendant, Siegel, for Active Collection Agency, Inc. By not paying over the so-called interest charges to the various creditors involved, Siegel's conduct manifested his knowledge of the falsity of that part of these claims. Under the circumstances, his conduct fell within the definition of the offense charged against him. And without the active assistance

of defendant, Schwartz, and the facilities of Schwartz' judicial office, Siegel could not have been successful. The verdicts are fully warranted under the evidence presented to the jury.

In support of their Motions in Arrest of Judgment, defendants also advance the argument that the entire magisterial probe was illegal, and therefore any prosecutions emanating therefrom and any evidence seized as a result thereof are void. These questions were raised before the Trial Judge in defendants' motions to suppress. We concur in his rulings, the reasons for which are noted in 39 D. & C. 2d 607 (1966). To avoid the trial court's findings and conclusions, the defense now asserts that the investigation was surrounded by "circumstances of deceit and coercion" which so permeated "the investigation with illegality as to invalidate all the proceeding(s) flowing therefrom. . . ." Neither the factual setting nor the cases cited, support the conclusion now urged upon the Court.

Numerous arguments are advanced in support of defendants' motions for new trial. The admission of so-called "jackets" and Magistrate Schwartz' unsworn testimony is pointed to as error. As stated above, we believe the trial judges rulings thereon were proper. See opinion reported in 39 D. & C. 2d 607 (1966). We are not called upon to rule on defendants' assertion that evidence of cases not listed in the Bills of Indictment was improper as defendants conceded in oral argument that this was a matter within the discretion of the Court and that such discretion was not abused in the circumstances. See *Commonwealth v. Cohen,* 203 Pa. Superior Ct. 34 (1964), cert. denied, 379 U. S. 902; *Commonwealth v. Petrosky,* 194 Pa. Superior Ct. 94 (1961); *Commonwealth v. Evans,* 190 Pa. Superior Ct. 179 (1959), affirmed, 399 Pa. 387, cert. denied, 364 U. S. 899, rehearing denied, 364 U. S. 939.

Defendants assert that the trial judge unduly participated in the trial of the case, citing as proof thereof that the Court interrupted defense counsel in their attempts to cross-examine the Commonwealth's witnesses, and certain alleged inflammatory remarks concerning practices of Magistrates and Constables. The comments referred to at N. T. 403 and 406 were out of the hearing of the jury and related to certain evidentiary rulings made by the Court (N. T. 402-407). Defendants' briefs fail to note this fact. Defendant Siegel sought to elicit on cross-examination testimony that investigators for the Attorney General's Office learned that there was discussion between constables, magistrates and City officials concerning fees or costs that were being assessed and charged. At sidebar and out of the hearing of the jury (N. T. 402), a lengthy discussion was had, during the course of which the Court stated: "I think as you all know, just as a matter of comment, Constable and Magistrate charges have been inflated in a scandalous matter for years, but that doesn't make it right," and in response thereto, Edwin P. Rome, Esquire, attorney for Siegel, responded "It may not make it right, but it goes to the point of whether there is the requisite mental intent to constitute a crime" (N. T. 403). The other comment referred to was made during the course of the same sidebar discussion (N. T. 406). Neither these comments nor any belief or opinion of the Trial Judge as to innocence or guilt of the defendants was ever transmitted to the jury. As stated in *Commonwealth v. Clairborne,* 175 Pa. 42, 49 (1954), quoted by defendants, "A defendant has a right to a trial by a fair and impartial jury whose consideration of his cause is not influenced by any language of the court which would create resentment or prejudice against him. . . ." This right was fully recognized by the Court, and given full weight. With respect to the interruptions referred to, an examination

of the record discloses the total impropriety of defendants' argument. Defendant refers to N. T. 80 as an example. The "interruption" by the trial judge was caused by an objection by the prosecutor (N. T. 78) and argument thereon and the Court's ruling in favor of defendant (N. T. 81). The defense also points to N. T. 438. Examination of the testimony (N. T. 435-440) reveals no trespass upon the legitimate scope of defense counsels' cross-examination. The extent and ingenuity of counsel in attacking the conduct of the Trial Judge is clearly evidenced by the final thrust. As stated in defendant's brief, "Indeed, toward the end of the trial, the Court began to use the word 'we' in referring to the prosecution's case (N. T. 838)." At page 837, the Court said, in ruling on a defense objection "If all they have to do is check the motor registration or check the telephone book and find that was his address during the period in question, then you are just wasting *our* time." Then at page 838, during the course of the same lengthy colloquy, the Court said "I just feel if *we* are wrong on the address, certainly, you ought to make the objection. But if it is just a matter of chasing out and get some record to prove what you know to be a fact . . .". This one comment in a discussion which covered four complete pages in the notes of testimony at ten minutes before five in the afternoon of the fifth day of trial seems rather ridiculous. Furthermore, in the context, it is clear that the word "we" was referred to the Court and jury in the same manner as the word "our" was used shortly before then. Examination of the record as a whole discloses that these defendants were accorded a fair trial by an impartial tribunal. Counsel and the defendants were treated with courtesy and respect, notwithstanding the sometimes trying circumstances and arduous nature of the trial.

It is also argued that the newspaper publicity made a fair trial an impossibility, citing: *Sheppard v. Maxwell,*

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384 U. S. 333 (1966); *Estes v. State of Texas*, 381 U. S. 532 (1965); *Commonwealth v. Mainer*, 26 D. & C. 2d 540 (Mercer Co. 1961). The striking differences between those cases and the instant case compels a different result. Newspaper publicity, in and of itself, is not a basis for concluding that the defendants were deprived of due process of law. There was no "carnival atmosphere at trial"; the witnesses were sequestered and generally insulated from the press; the jury was sequestered and not permitted to have access to any press or news media; counsel did not indulge in a trial by press, T. V. and radio, and in fact there was no bias on the part of the trial judge or any of the jurors evidenced in the conduct of the trial. The defense points to the participation of John P. Mason as trial counsel, and also appearing as a witness for the prosecution. Mason was not the prosecutor, and when objection was raised as to his participation, the court noted he was not acting as counsel and instructed the jury that he was merely a witness sitting at counsel table (N. T. 182-197, 212, 213). Mr. Mason was the principal investigator for the Department of Justice and trial counsel relied upon his knowledge of the case. Under the circumstances, the defense position that the trial was weighted against defendant unfairly is without merit.

Three matters remain for consideration of these motions. Constable Siegel complains that his motion for severance was improperly denied. This argument is based upon the assertion that the defendants were respectively charged with different offenses, and as a result evidence only admissible against Schwartz was allowed in evidence as against Siegel. Siegel cites and relies upon *Commonwealth v. Schmidheiser*, 111 Pa. Superior Ct. 283 (1933); *Commonwealth v. Dauphinee*, 121 Pa. Superior Ct. 565 (1936); *Commonwealth v. Reilly*, 125 Pa. Superior Ct. 340

(1937). The difficulty with this argument is that the charges were not "separate and distinct" in the sense and meaning of the cases. The charges against Schwartz and Siegel arose out of the relationship of the defendants and their conduct with respect to each other and third persons. See Act of March 31, 1860, P. L. 427, § 40, 19 P. S. § 785; *Commonwealth v. Cohen,* 203 Pa. Superior Ct. 34, 70-71 (1964); *Commonwealth v. Sonis,* 81 Pa. Superior Ct. 205 (1923); *Commonwealth v. Kloiber,* 378 Pa. 412 (1954); *Commonwealth v. Patrick,* 416 Pa. 437 (1965).

The only evidence admitted at the trial which was applicable to defendant Schwartz alone were his admissions. As to those, the Court carefully instructed the jury at the time of their admission (N. T. 797) and in his charge to the jury (N. T. 1016) that these admissions could only be considered as against Schwartz. The motion for severance was properly denied. *Della Paoli v. United States,* 352 U. S. 232 (1957).

Defendant Schwartz argues that reputation evidence presented by and in behalf of Siegel was improperly limited to Siegel. The circumstances or setting was as follows: Near the close of the Commonwealth's case, a conversation occurred between counsel and the Court. As a result of that conversation, Siegel was permitted to introduce evidence of his good reputation and also of Magistrate Schwartz' good reputation (N. T. 904, 905). In the prior discussions counsel for the Commonwealth and the defense discussed the advantage sought to be gained by the defense. The defense wanted to have the final argument. To get that supposed tactical advantage, Schwartz' counsel decided that he would introduce no reputation evidence. By agreement between defense counsel, it was decided that defendant Siegel would produce all the reputation evidence; that is, evidence of his own good reputation, and also of

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Schwartz' good reputation. Of course, the testimony as to Siegel's good reputation was admitted generally and was considered as applicable to all the charges against Siegel.

The Trial Judge was maneuvered into a rather difficult position inasmuch as the defense presented a novel request. Over the strenuous objection of the Commonwealth, the Court permitted the defense to use this scheme to deny to the Commonwealth its rebuttal (N. T. 950). Before delivery of instructions to the jury, discussion was had between the Court and counsel concerning Schwartz' attorney's reference to the good reputation of Schwartz (N. T. 960-962) at which time the precedure and limitations were again discussed (N. T. 968-969). The Court's general charge on reputation evidence was given as regards defendant Siegel, who was given the full benefit and weight of that evidence (N. T. 1023-1025). In addition, in line with the agreement of counsel, the Court charged the jury that they could consider the evidence of Schwartz' good reputation in the light of the fact that to sustain a charge of conspiracy they must find an unlawful agreement (N. T. 1025).

Defendants argue it was error to instruct the jury to consider reputation evidence presented by and in behalf of Siegel, only in Siegel's case. This argument is made by way of analogy to cases holding generally that inculpating evidence presented by one defendant would have been admissible in evidence generally, citing *Commonwealth v. Farley,* 168 Pa. Superior Ct. 204 (1951) which does not support the proposition, and *Borum v. United States,* 56 F. 2d 301, 305 (D. C. Cir. 1932), which held only that a defendant may be convicted on the uncorroborated testimony of an accomplice. It is argued therefrom that exculpatory evidence likewise should have been received generally.

The basic fallacy to this position is the nature of the evidence introduced. Siegel was permitted to introduce evidence of Schwartz' good reputation only because he, Siegel, was charged with having joined in a conspiracy with Schwartz. Had the jury accepted this evidence as establishing the innocence of Siegel necessarily Schwartz would have likewise been acquitted on the charge of conspiracy. The evidence of Schwartz' good reputation would not have been admissible under any other circumstance in Siegel's case. Schwartz knowingly and with full understanding of the consequences, decided to rest his case, considering the final argument to the jury as more important than presentation of evidence. The prejudice to Schwartz, under the circumstances of this case, is not apparent. Schwartz did benefit from the evidence, and the Commonwealth should not be penalized by the decision of Schwartz and his experienced and competent counsel. *Commonwealth v. Cohen,* 103 Pa. Superior Ct. 496 (1931) is not applicable. Schwartz was not denied the right to introduce evidence of his good reputation. On the contrary, he declined to produce such testimony in his own defense.

Finally, the defendants say they are entitled to a new trial as a result of the Court's refusal to permit cross-examination as to "custom" and in rejecting Siegel's offer to prove "custom." At the outset it must be understood that the crimes with which Siegel was charged required, as an element, proof of criminal intent. *Commonwealth v. Benz,* 318 Pa. 465 (1935); *Commonwealth v. Matthews,* 196 Pa. Superior Ct. 60 (1961); *Commonwealth v. Ferguson,* 95 Pa. Superior Ct. 153 (1928); *Commonwealth v. Schmidt,* 95 Pa. Superior Ct. 102 (1928). It is, generally stated, a proper defense that the accused did not have the requisite intent at the time when the act was committed. As stated in *Commonwealth v. Junkin,* 170 Pa. 194, 199 (1895), "The

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essential element of crime, unless otherwise declared by statute, is the intent to commit it, or the willfulness of it." If follows, therefore, " 'As a general rule, a bona fide and reasonable belief in the existence of facts which, if they did exist, would render an act innocent, is a good defense.' Clark and Marshall, Crimes (4th ed.) § 55, p. 83. And see *Com. v. Unkrich*, 142 Pa. Superior Ct. 591, 597, 16 A. 2d 737; *Com. v. Schambers*, 105 Pa. Superior Ct. 467, 471, 472, 161 A. 624." *Commonwealth v. Lefever*, 151 Pa. Superior Ct. 347, 353, 354 (1943).

An extension of this rule has developed which permits, in certain limited circumstances, the proof of custom to negative criminal intent. In *Commonwealth v. Trunk*, 311 Pa. 555 (1933), defendants were charged with false imprisonment and assault and battery. In connection with the first charge, defendants sought to prove that they had taken the victim into custody in reliance upon a customary practice existing in the county and in many other counties of the Commonwealth. The trial judge charged the jury, in part, that "Any person who accepts public office must be presumed to know the law with respect to the administration of the duties of the office accepted." Mr. Justice Schaffer, speaking for the Supreme Court, 311 Pa. at 573, said "This was virtually an instruction by the judge that the defendants had been engaged in an illegal act and that their motives and intent, or mistake if they were mistaken, were not to be considered by the jury in determining their guilt or innocence. We could not for a moment sanction such a ruling." The custom in Trunk was one which had developed under a statute which had never been construed and which was not clear and unambiguous on its face. See also *Commonwealth v. Wilson*, 158 Pa. Superior Ct. 198 (1945). In *Wilson*, the defendant was charged with failing to appear pursuant to a subpoena. The practice in

the county was to serve one subpoena to appear for the grand jury and another for the trial, although the act apparently required the issuance of only the first subpoena. Defendant was never served the second subpoena and failed to appear at trial. The Superior Court, 158 Pa. Superior Ct. at 205, 206, by Judge Rhodes, said: "We should be slow to overrule a practice steeped in local tradition, even if we saw reasons for doubting it, where sudden non-adherence would make one subject to criminal prosecution. A witness in the position of this defendant might find himself imprisoned because his *honest judgment* did not anticipate the possible implication of a subpoena and the alleged obligation imposed thereby in direct contradiction to the interpretation given, and the practice followed, by the representatives of the Commonwealth in Mercer County, men learned in the law." (Emphasis added) At the same time, it has been held that "A custom or usage repugnant to the express provisions of a statute is void, and whenever there is a conflict between a custom or a usage and a statutory regulation the statutory regulation must control." *Commonwealth v. Ellis* (No. 1), 46 Pa. Superior Ct. 72, 78 (1911). See also *Commonwealth v. Shaffer*, 32 Pa. Superior Ct. 375 (1907). Defendants rely principally upon *Commonwealth v. Bollinger*, 197 Pa. Superior Ct. 492 (1962). As stated in Bollinger, the defendant's "theory was that he had no criminal intention for the reasons (a) that the practice which he followed was in accord with the custom which prevailed in York County, and (b) that he had sought advice in connection therewith from several public officials and had at no time been informed that the practice was improper." The circumstances were that Bollinger was a constable in York County; that he regularly employed certain persons who were not deputy con-

stables to actually serve process for him; that this was a common practice for constables in York County; that not only was this practice common, it was known to the district attorney's office and controller's office; and finally that Bollinger had actually sought the advice of a judge and an assistant district attorney concerning the legality of the practice. The practice followed by Bollinger did not result in payment of double fees, or in payment of more money than was provided by law. Finally, the practice was not in direct contravention of positive statutory mandate. In these circumstances, the Superior Court, in a four to three decision, held it was error not to permit defendant to attempt to prove his theory. There was no question of Bollinger's knowledge of facts supporting his theory of defense since Bollinger testified as to the inquiry he had personally made of enforcement officials.

Does Siegel's offer of proof meet the requirements set forth in the cases? It should be noted at the outset that the evidence disclosed Siegel was demanding and receiving monies in excess of those provided by law. In this respect his conduct was in breach of a positive statutory mandate. In addition, he charged fees for mileage without regard to the statutory requirements for establishing such fees, and generally in excess of the fee properly chargeable by statute. In two cases Siegel raised the principal debt claimed by the creditor. No custom, it would seem, should be accepted which permits the increase of a debt without regard to law or any agreement to such an increase. Lastly, Siegel added arbitrary amounts to judgments for interest, at no set rate, which after collecting he pocketed or credited to his own or the account of Active. Ostensibly the money was collected in behalf of the creditor, but without the creditors knowledge, instruction or consent, and

retained by Siegel, *in addition to the fees he charged for collection.*

In *Bollinger*, the Superior Court, at page 496, affirms as true that "it never was and never can be a defense to any crime that other people also were violating the law." We believe, after careful analysis of the authorities, the evidence in the record, and the offer of proof, the trial court's rulings were correct. At best, all that Siegel offered to prove was that other persons were also violating the law.

The defense sought to establish that creditors had a practice of adding a surcharge to delinquent bills, which the Court would not permit (N. T. 82). Then, at N. T. 389-390, defendant Schwartz attempted through cross-examination to establish that it was "a custom and practice with the Magistrates in Philadelphia County to charge $7.50 for a summons" to which attempt an objection was sustained. The evidence disclosed that in every case, Magistrate Schwartz charged $2.50 costs for issuance of the summons. This money was paid to the City Treasurer, and receipts therefor were accounted for to the City Controller, as required by law. Even if the Magistrate had charged $7.50 for the issuance of a summons, no so-called custom could be invoked to protect the Magistrate if he had, contrary to law, pocketed all or any part of such sum to his own use and benefit. And again, Schwartz sought to determine what costs were discovered by the Attorney General's Office to have been charged by other Magistrates in Philadelphia. Again, at N. T. 402-407, the defense sought to go into the question of discussions between constables, magistrates, district attorneys and city solicitors. All of this was attempted to be introduced by way of cross-examination of John P. Mason. With respect to the first two matters, clearly the fact that other magistrates and constables violated the law would not be a defense. As to the attempt to establish acquiescence by city officials through Mason,

it is quite clear that he could not testify in any respect to matters which could not possibly be linked up to these defendants, by his testimony. Furthermore, his testimony, if admitted would clearly have been hearsay, and no exception to the rule was pointed to as allowing for its admission in evidence.

Counsel for Siegal made an offer to prove, by a Mr. Winitz, a constable of the County of Philadelphia, that Winitz was familiar with Constables' fees, with certain meetings with unidentified City representatives and of the "customary" fees charged by constables for services in Philadelphia. The offer of proof went further, in that Siegel offered to prove by one Benjamin Katz, Esquire, that department stores customarily added charges to their bills, that they knew the fees charged by constables, and knew that constables sometimes added to their claims, and that such practices were known to the District Attorney's and City Solicitor's Offices in the City. These offers were also rejected.

Basically, the defense offered to prove that the constables and magistrates believed the fees provided by law were either inadequate or difficult of application, and as a result, they met and mutually agreed to increase the fees above those allowed by statute. Therefore, in an effort to justify these actions, the constables and magistrates informed the City's representatives of what they had done. Now these defendants come in to Court and assert that by such conduct, a custom was created. Nothing in the cross-examination proposed or in the offers of proof would establish or tend to establish that (1) the fees charged or interest collected or raising of claims was sanctioned by law, (2) the fees charged were not in violation of statute, (3) the defendants, or either of them, acted in reliance upon or with the knowledge of, the so-called custom sought to be proved. All that the offer of proof would have shown is

that some constables got together and decided the statutory fee bill was too low and had not been increased commensurate with the cost of living, so they took it upon themselves to increase the fees without legislative approval. The offer did not go to the improper charge and retention of interest or raising of debt. We therefore believe that the offers of proof were properly denied. At best, all that defendants could have proved was the commission of similar offenses by others. They could not prove bona fide and reasonable reliance upon facts which would, if true, have rendered their conduct innocent. One final matter requires comment. During the course of his speech or argument to the jury, which as previously noted, was the final argument, counsel for Schwartz made reference to various matters in direct contravention of prior rulings of the Court (N. T. 961-967).

Schwartz' counsel argued, pointing to the mass of records produced from Magistrate Court No. 11, that of the thousands of cases heard by Schwartz only in these few were any irregularities or improprieties discovered. Consequently the Court, in its charge to the jury mentioned the attempt by the Commonwealth to introduce into evidence additional jackets and their contents to show or establish the pattern of defendants' conduct (N. T. 1021). It was suggested in oral argument before the Court en banc that this comment by the Trial Judge was prejudicial to defendants. It was not.

The Court sustained the objections of both defendants to the introduction of additional case records or jackets in cases not named in the bills of indictment. As conceded in oral argument, evidence of cases not noted in the Bills of Indictment were properly admissible in a conspiracy case involving charges of fraud. *Commonwealth v. Cohen*, 203 Pa. Superior Ct. 34 (1964). Furthermore, since these were

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public or official records (see *Commonwealth v. Schwartz*, 39 D. & C. 2d 607 (1966)), and were original records, they were the best evidence of their own contents. See 1 Henry, Penna. Evidence, Ch. 8.

The Court excluded this evidence on the ground, after lengthy argument by all counsel, that evidence in addition to that already adduced might be prejudicial to defendants, and not because the offered evidence was otherwise inadmissible (N. T. 753-776). And the Court made it clear to counsel for both defendants that they could not properly argue the Commonwealth only proved a few cases of impropriety from the Court's sustaining of their objections. Schwartz' counsel had the last unrebutted argument, and attempted thereby to gain an unfair advantage by referring to matters explicitly ruled beyond the scope or compass of fair comment. Furthermore, the Court's comment, taken in context, merely required the jury to weigh the sufficiency of the evidence actually before them, without regard to whether the Commonwealth could or could not have produced more. Properly considered, there was neither error nor prejudice to defendants.

We conclude, after a careful consideration of the record and the briefs and arguments of counsel, that defendants' motions in arrest of judgment or for new trial must be dismissed. The Trial Judge shall impose such sentence as he deems appropriate in the circumstances.

By THE COURT.
McDevitt, III, *P. J.*

Filed: Dec. 7, 1966
Copies to:

Edwin P. Rome, Esq.,
Marvin Comisky, Esq.,
Richard A. Sprague, Esq.

ORDER.

(Both cases.)

Now, this 7th day of December, 1966, the defendants' Motions in Arrest of Judgment and for New Trial are hereby denied.

Sentence on the verdicts is deferred to Wednesday, December 14, 1966, at 10:00 A. M., in Room 195, City Hall, Philadelphia.

By THE COURT,
McDevitt, III, *P. J.*

Copies to:

Edwin P. Rome, Esq.,
Marvin Comisky, Esq.,
Richard A. Sprague, Esq.

JUDGMENT OF SENTENCE.

(Siegel case.)

Dec. 14, 1966—And now Sentence:

880—Not less than 11 months nor more than 23 months in the Philadelphia County Prison.

893—Not less than 11 months nor more than 23 months in the Phila. County Prison to run concurrent with sentence on bill 880 and pay a fine of $1,250.

896—Not less than 11 months nor more than 23 months in the Phila. County Prison and pay a fine (prison sentence on bill 896 to run concurrent with bill 893).

898—Not less than 11 months nor more than 23 months in the Phila. County Prison to run concurrent with bill 896 and pay a fine of $1,250.

900—Not less than 11 months nor more than 23 months in the Philadelphia County Prison, to run concurrent with sentence on bill 898 and pay a fine of $1,250.00

JUDGMENT OF SENTENCE.

(Schwartz case.)

Dec. 14, 1966—And now Sentence:

880—Not less than 11 months nor more than 23 months in the Philadelphia County Prison.

Eo die Same Bail to stand pending Appeal—

Supersedeas allowed on payment of fines.

881—Sentence Suspended.

882—Sentence Suspended.

883—Sentence Suspended.

884—Sentence Suspended.

885—Sentence Suspended.

891—Not less than 11 months nor more than 23 months in the Philadelphia County Prison, to run concurrent with sentence on bill 880, and pay a fine of $2,500.00.

892—Not less than 11 months nor more than 23 months in the Philadelphia County Prison, to run concurrent with sentence on bill 891, and pay a fine of $2,500.00.

897—Not less than 11 months nor more than 23 months in the Philadelphia County Prison, to run concurrent with sentence on bill 892, and pay a fine of $2,500.00.

905—Not less than 11 months nor more than 23 months in the Philadelphia County Prison, to run concurrent with sentence on bill 897, and pay a fine of $2,500.00.

OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA.

Opinion by ERVIN, *P. J.* FILED: September 14, 1967

These are appeals of Harry C. Schwartz, a magistrate, and Abraham Siegel, a constable, from judgments of sentence, after having been found guilty by a jury on a variety of charges arising out of the investigation of the Magistrates Courts in the City of Philadelphia.

Both defendants were found guilty of the crime of conspiracy, Indictment No. 880 charging that they did "falsely and maliciously conspire to insult public justice; to commit official oppression while exercising their respective public offices; to use the power of their respective offices for their own personal gain—Constable Siegel directly and Magistrate Schwartz indirectly through his wife—and to cheat and defraud the debtors in the civil cases set forth in the attached list by adding to each of said claims a false and fictitious sum represented to be interest owed by the alleged debtors to the creditors; and did further conspire to violate the Constable's Fee Bill, Act of July 20, 1917, P. L. 1158, as amended, 13 P. S. § 61, by demanding, imposing and adjudging in each claim a false, fictitious and excessive sum for constable's travelling expenses instead of the legal sum provided by Act of Assembly." Each defendant was sentenced to from 11 to 23 months in the Philadelphia County Prison for this crime.

Schwartz was also found guilty on Indictment No. 881, which charged that he "in his capacity as magistrate, did commit malfeasance, misbehavious in office and official oppression by willfully, knowingly and corruptly issuing civil summonses and sitting in judgment upon the civil cases set forth and at the dates set forth in the attached list, with the knowledge that his wife, Lillian Schwartz, as an officer and principal owner of the Active Collection Agency, Inc.,

which then and there was the collection agent or sub-agent of the various creditors of said claims, would obtain a direct pecuniary benefit from the results of the said cases by receiving a commission on all judgments and costs paid by the alleged debtors and that he, therefore, would indirectly benefit thereby." The court suspended sentence on this indictment.

Schwartz was also found guilty by the jury on Indictment No. 883, which charged that he "a magistrate of the City and County of Philadelphia, in his capacity as magistrate, did commit misbehavior in office" and then the language on this indictment is similar to that set forth for the preceding indictment. Sentence was suspended by the court on this indictment.

Schwartz was also found guilty by the jury on Indictment No. 883, which charged that he a "magistrate of the City and County of Philadelphia, in his capacity as magistrate, did commit official oppression by wilfully, knowingly and corruptly issuing civil summonses and sitting in judgment upon the civil cases set forth and at the dates set forth in the attached list" and then the language of this indictment is similar to that set forth in the preceding indictment. Sentence was suspended on this indictment by the court.

Schwartz was also convicted on Indictment No. 884, which charged that he "a Magistrate of the City of Philadelphia, did, in connection with the thousands of civil cases filed in his Court, and more particularly the civil cases set forth and at the times set forth in Schedule attached hereto, wilfully and corruptly neglect and fail to perform the duties of his office by:

"1. Failing to strike off the false and fraudulent amounts represented by Constables to be interest allegedly owed by debtors to the creditors of said claims;

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"2. By failing to award and enter judgment for proper and legal constable fees and travelling expenses in said cases;

"3. By failing to require adequate and legal constable's returns of service in the said cases; and

"4. By failing to require the constable to endorse on the execution or a schedule thereto attached, the goods or chattels levied upon and the time of such levies when such levies were made." Sentence was also suspended on this indictment.

Schwartz was also found guilty by a jury on Indictment No. 885 charging that he "a magistrate of the City and County of Philadelphia, in his capacity as magistrate, did commit malfeasance by knowingly and corruptly issuing civil summonses and sitting in judgment upon the civil cases set forth and at the dates set forth in the attached list" and then the language in this indictment is similar to that in Indictment No. 883. Sentence was also suspended by the court on this indictment.

Schwartz was also found guilty on Indictment No. 891, which charged that he "a Magistrate of the City of Philadelphia, who was interested in Constable Abraham Siegel and the Active Collection Agency, Inc. unlawfully and feloniously did then and there falsely and designedly pretend and represent to Dorothy and Richard Iseley, by issuing a summons and entering judgment thereon: (1) That there was claimed by the Bell Telephone Company, a creditor in a civil claim against Dorothy and Richard Iseley, the sum of $2.50 as interest on the claim and that the said interest was owed by defendants to the said creditor; whereas, in truth, and in fact as he, the said Magistrate Schwartz then and there well knew, the said creditor and its agent for collection, the Philadelphia Credit Bureau, which had sent the claim to Abraham Siegel or to Active Collec-

tion Agency, Inc., of which Abraham Siegel was then an o
ficer, and of which said Magistrate Schwartz's wi
Lillian Schwartz, was a principal share holder and pre
dent, did not claim any interest from the said Dorothy a
Richard Iseley and had not asked the said Abraham Sieg
or Active Collection Agency, Inc. to collect any intere
from said Dorothy and Richard Iseley; and that the sa
sum of $2.50 was fictituous and false, and which he we
knew had been fraudulently added to the claim by Abraha
Siegel or Active Collection Agency, Inc.; and

"(2) that the lawful constable's fee and mileage f
Constable Abraham Siegel's service of Summons No. 3608
issued by Magistrate Harry C. Schwartz in connection wi
the above mentioned claim, was $6.50 whereas in fact, th
said sum was a greater compensation for service of th
summons and mileage than is provided by law and was
fictitious and false amount,

"he, the said Magistrate Harry C. Schwartz well knov
ing said pretences to be false, by means of which he di
aid, assist, or abet Constable Abraham Siegel and th
Active Collection Agency, Inc. in obtaining from the sai
Dorothy and Richard Iseley the sum of $9.00 with inte
to defraud the said Dorothy and Richard Iseley." On thi
Indictment Schwartz was sentenced to a term of 11 to 2
months in the Philadelphia County Prison to run con
currently with the sentence on the bill No. 880 and he wa
also directed to pay a fine of $2,500 on this bill of indictmen

Schwartz was also found guilty on a similar bill o
Indictment No. 892 for defrauding Kasmir and Elva Cylbu
ski. A similar sentence was imposed as that which was im
posed on the preceding indictment.

Schwartz was also found guilty on another bill of in
dictment No. 897, similar to the preceding indictment, fo

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defrauding Lillian and Gustave Huston. A similar sentence was imposed on this indictment as on the preceding indictment.

Schwartz was also found guilty on another bill of indictment, No. 905, similar to the preceding indictment, for defrauding Bernard and Tilly Granoff, and a similar sentence was imposed as on the preceding indictment.

Siegel was found guilty by a jury on Indictment No. 893, which charged that he "a Constable of the City of Philadelphia and an officer of Active Collection Agency, Inc. unlawfully and feloniously did then and there falsely and designedly pretend and represent to Kasmir and Elva Cylbuski:

"(1) That there was claimed by Gimbel, a creditor in a civil claim against Kasmir and Elva Cylbuski, the sum of $1.50 as interest on the claim and that said interest was owed by defendants to the said creditor; whereas, in truth and in fact as he, the said Abraham Siegel then and there well knew, the said creditor and its agent for collection, the Philadelphia Credit Bureau, which had sent the claim to Abraham Siegel or to Active Collection Agency, Inc. of which Abraham Siegel was then an officer, for collection, did not claim any interest from the said Kasmir and Elva Cylbuski and had not asked Abraham Siegel or Active Collection Agency, Inc. to collect any interest from said Kasmir and Elva Cylbuski; and whereas in fact he knew that the sum of $1.50 was fictitious and false; and

"(2) that his, the said Abraham Siegel, lawful constable's fee and mileage for his service of Summons No. 37131 issued out of Magistrate Court No. 11, in connection with the above mentioned claim, was $6.50, whereas in fact, the said sum was a greater compensation for his fees for service of the summons and mileage than

is provided by law, and was, as he well knew a false and fictitious sum,

"he, the said Abraham Siegel well knowing said pretences to be false, by means of which he did obtain from the said Kasmir and Elva Sylbuski the sum of $8.00 with intent to defraud the said Kasmir and Elva Cylbuski."

On this indictment he was sentenced to a term of not less than 11 nor more than 23 months in the Philadelphia County Prison, to run concurrently with the sentence imposed on Bill No. 880. He also was sentenced to pay a fine of $1,250.

Siegel was also found guilty on three other similar indictments, Nos. 896, 898 and 900, to defraud Dorothy and Richard Iseley, Lillian and Gustave Huston and Bernard and Tilly Granoff. Similar sentences were imposed on these indictments as that imposed under the indictment No. 893.

The evidence, viewed in the light most favorable to the Commonwealth, established the following facts: In 1954 Harry C. Schwartz was an elected constable in the City of Philadelphia. On January 4, 1955 he appointed defendant Abraham Siegel as deputy constable. On November 5, 1957 Siegel was elected constable, effective for six years from January 2, 1958, and Schwartz was reelected a constable on the same date, effective as of January 2, 1958. Schwartz was thereafter appointed to serve as magistrate of Court No. 11, effective as of December 23, 1960, and was elected to serve a full six year term, effective from January of 1962. Constable Siegel was again reelected to serve a six year term effective from January of 1964.

At the time when defendant Schwartz was a duly elected constable of the City of Philadelphia, and on Janu-

ary 20, 1954, he caused the name of Active Collection Agency to be registered as the name under which he would operate his collection business. On January 4, 1961 articles of incorporation were filed with and approved by the Secretary of the Commonwealth incorporating Active Collection Agency, Inc. As of January 10, 1961 the officers of the corporation were Lillian Schwartz, president; Sidney B. Goldstein, a certified public accountant, secretary; and Abraham Siegel, treasurer.

Lillian Schwartz was at all times material to this case the wife of defendant Harry C. Schwartz. Lillian Schwartz was not active in the operation of the collection business, although she received a substantial salary as president of the corporation.

Before Schwartz was elected as a magistrate he did collection work for Philadelphia Credit Bureau. Active Collection Agency, Inc. continued to do work for the Philadelphia Credit Bureau but in much larger volume.

On numerous occasions defendant Siegel made improper service of the summons, improper service of execution and levy, or failed to make a levy of any kind, and filled in as standard practice identical descriptions of property levied upon in his returns. In the cases proved, certain amounts of money were added to the principal debt owed by the debtor. In each case aribtrary amounts of interest were added, which were pocketed by the collection agency and not paid to the creditor. Siegel also added mileage fees without regard to actual mileage, notwithstanding that the "service" was often improperly made. In addition, in each case costs were imposed of $7.50 or $9.00, in direct contravention of the statutory fee of $2.50.

The connection between Schwartz and Siegel was proved by the following facts. Magistrate Schwartz had been a constable prior to his election as a magistrate. As

a constable he appointed Siegel as his deputy constable, and also operated the Active Collection Agency. Upon his elevation to the minor judiciary Schwartz turned over the collection business to his wife, Lillian, and defendant Siegel, who continued on as a constable. Schwartz, notwithstanding his wife's position in Active Collection Agency (she owned 75% of the voting and 65% of the preferred stock from the date of incorporation until the end of 1963; thereafter 50% of each and received a salary for 1961 of $5,200, which was increased to $13,785.94 in 1964), continued to sit in judgment on cases where the creditor was represented by Active Collection Agency, Inc. The inescapable conclusion is that the business of Active Collection Agency, Inc. increased as a direct result of the relationship between Siegel and Schwartz. Significantly, although Mrs. Schwartz was president and principal stockholder of Active Collection Agency, Inc., and received until 1964 a substantially greater proportion of the profits by way of what was called salary, she actually contributed no actual work or effort to the collection business. Defendant Siegel was, for all practical purposes, Active Collection Agency, Inc. Philadelphia Credit Bureau's representative testified he dealt directly with Siegel.

Although Active Collection Agency had its own office, Siegel operated primarily out of Magistrate Court No. 11. In virtually every case testified to by Magistrate Schwartz' clerk, the docket or daybook contained only the name of the parties, address of defendant, $2.50 for costs, summons number, date of issuance and return date. To ascertain the other information about the disposition of cases before Magistrate Schwartz, it was necessary to examine the so-called "jackets" in which the suit papers and other documents were kept. On the face of these jackets appeared

the notation "judgment," and amounts corresponding to the principal debt, interest and costs. Notations in the dockets or daybooks were made by the magistrate's clerk; however, notations on the jackets were made by the constable.

In at least one case Magistrate Schwartz entered a judgment where the debt due exceeded $100, the limit of his civil jurisdiction. Interest and costs added to the judgment increased the debtor's liability from $105.36 to $129.60.

The pattern of Siegel's conduct was that he would receive an IBM card or notice of claim with the name and address of the debtor, the amount of the real debt and the date of the last communication or payment by the debtor. Siegel would then add to the claim an arbitrary sum for interest and in some case, without explanation, increased the amount of the real debt. A summons was then made out by Siegel and, after issuance by Magistrate Schwartz, service was made often by mail rather than personally, as required by law, and on some occasions the summons was never actually served. This was followed by the entry of judgment by Schwartz in favor of the creditor. Although by law the constable is entitled to receive a fee of $2.50 plus $.10 per mile for service of the summons, he was consistently awarded $5.00 for one defendant and $6.50 for two defendants, without regard to the actual amount to which he was entitled and without regard to the improper service. The constable would fill in the amount of the debt on the summons after its issuance by Magistrate Schwartz.

After judgment was entered, Schwartz permitted Siegel to send out writs of execution under his, Schwartz' name, but Schwartz never followed up Siegel's actions. Siegel's levies were uniform in their impropriety—notices of levy and inventory of goods levied upon were prepared in Siegel's office and were all virtually identical. Notices

were either mailed to the debtor or left in the debtor's mail-box, without entry into the debtor's home. Siegel claimed and collected fees for this service which was improperly performed, and the fees claimed and collected did not conform to the statutory fee bill. The various creditors did not ask that interest be added or collected, and never received more than the real debt. The creditor sometimes received less that the real debt even though it was actually collected in full.

Finally, by Magistrate Schwartz' own admission, he was Active Collection Agency until he became a magistrate. Thereafter, he stated, "We formed a corporation in that name immediately after I became a Magistrate." He also confirmed that his wife, Lillian Schwartz, retained the controlling interest in the corporation although generally she did not perform any vital services for the business. The tenor of the statements made by Schwartz clearly indicates that, even after he became a magistrate, he regarded himself as being in the collection business. To make that even clearer, Schwartz said: "I handle all this business for one reason. If my wife makes money, I'm going to benefit by it because I have an opportunity to spend some of the money she makes, being the president of the company that employs the Constable who handles the work."

Appellants first argues that appeals Nos. 881, 882, 883 and 885 are not sufficient to charge an indictable common law crime. It is argued that the allegations of "indirect" benefit, on their face, are not sufficient to constitute the required corrupt and criminal motive nor otherwise aver an indictable common law crime.

What conduct may be punished under the common law is described in *Com. v. Evans*, 190 Pa. Superior Court 179, 154 A. 2d 57, affirmed 399 Pa. 387, cert. denied 364 U. S.

89, rehearing denied 364 U. S. 939. In that case this Court stated, at page 225; "Misbehavior in office is a common law offense. *Com. v. Brownmiller, supra,* 141 Pa. Superior Ct. 107, 120, 14 A. 2d 907. The offense occurs when there is a breach of a positive statutory duty or the performance by a public official of a discretionary act with an improper or corrupt motive. *Com. v. Peoples,* 345 Pa. 576, 579, 28 A. 2d 792; McNair's Petition, 324 Pa. 48, 55, 187 A. 498. Evans and Torrance here were charged with the performance of a discretionary act with an improper or corrupt motive. A discretionary duty must be exercised with reason as opposed to caprice or arbitrary action; the term discretion '"imports the exercise of judgment, wisdom, and skill, as contra-distinguished from from unthinking folly, heady violence and rash injustice."' *Com. v. Brownmiller, supra,* 141 Pa. Superior Ct. 107, 120, 14 A. 2d 907, 913. In its penal sense misbehavior in office does not encompass mere errors in judgment or departures from sound discretion, but an official must perform those official duties which require the exercise of a sound discretion to the interest of the Commonwealth and not capriciously, arbitrarily, and with a willful and corrupt design. *Com. v. Brownmiller, supra,* 141 Pa. Superior Ct. 107, 120, 121, 14 A. 2d 907. The willful and corrup motive need not arise from personal benefit. See *Com. v. Brownmiller, supra,* 141 Pa. Superior Ct. 107, 121, 122, 14 A. 2d 907."

In the recent case of *Com. v. McKarski,* 208 Pa. Superior Ct. 376, 381, 222 A. 2d 411, Judge Jacobs, for this Court, reviewed a number of cases on this subject in the following language: "What is a common law offense? There are many statements, helpful and otherwise, in our cases on this subject.

"In *Commonwealth v. McHale*, 97 Pa. 397, 408 (1881), the Supreme Court said: 'The highest authority upon this point is Blackstone. In chap. 13, of vol. 4, of Sharswood's edition, it is thus defined: "The last species of offenses which especially affect the Commonwealth are those against the public police or economy. By the public police and economy I mean the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations." '

"In the same case, at p. 410, it was said: 'We are of opinion that all such crimes as especially affect public society are indictable at common law. The test is not whether precedents can be found in the books, but whether they injuriously affect the public police and economy.'

"In *Commonwealth v. Mochan*, 177 Pa. Superior Ct. 454, 458, 110 A. 2d 788 (1955), this Court said: 'Any act is indictable at common law which from its nature scandalously affects the morals or health of the community.'

"In *Commonwealth v. Miller*, 94 Pa. Superior Ct. 499, 507 (1928), it was said: 'The common law is sufficiently broad to punish as a misdemeanor, although there may be no exact precedent, any act which directly injures or tends to injure the public to such an extent as to require the state to interfere and punish the wrong doer, as in the case of acts which injuriously affect public morality, or obtruct, or pervert public justice, or the administration of government.'

"In *Commonwealth v. Orris*, 136 Pa. Superior Ct. 137, 146, 7 A. 2d 88 (1939), it was said: 'Among the offenses described as misdemeanors at common law are those less than felony, but such "trespasses against good morals" as tend "to outrage decency." '

"A consideration of the factual context of each of these cases is helpful in understanding the kind of conduct these broad statements were aimed at. In *Commonwealth v. McHale, supra,* the charge was procuring false counts and returns of votes at an election and depositing false election ballots. In *Commonwealth v. Mochan, supra,* the defendant made numerous telephone calls to a married woman, accusing her of being a lewd and immoral woman, and used disgusting and indecent language in his telephone talks. *Commonwealth v. Miller, supra,* involved a police officer indicted for malfeasance in office. In *Commonwealth v. Orris, supra,* there was an attempt to carnally know a twelve year old girl."

We are convinced that the language of Indictments Nos. 881-3 and 885 is sufficient to charge a common law crime. We are also convinced that Schwartz had a statutory duty not to sit in those cases. The Act of March 30, 1875, P. L. 35, as amended, 12 P. S. § 111, provides in part that "Changes of venue shall be made in any civil cause, in law or in equity, depending in any of the courts of this Commonwealth, in the cases following; namely—First. Whenever the judge . . . shall be personally interested. . .

"Third. Whenever any near relative of such judge shall be a party to any such cause, or interested in the event thereof. . . .[1] These statutory provisions clearly show what the public policy is in this state. The law has always considered the relationship between spouses as a very close one. In fact, they are regarded as one person and not as separate entities, and the married women's acts have not changed this concept; *Alles v. Lyon,* 216 Pa. 604, 606, 66 A. 81. The relationship, unlike that of other per-

1. The Canons of Judicial Ethics, adopted by the Supreme Court of Pennsylvania on February 11, 1965, also provide: "A judge should not act in a controversy where a near relative is a party."

sons, may not be entered into nor dissolved without the consent of the state. What affects one affects the other and we cannot conceive of a closer human relationship. We are further convinced that Schwartz had a corrupt motive for sitting in these cases. All litigants "are entitled to a hearing and determination by an impartial tribunal, and hence no judge should preside in a case in which he is not wholly free, disinterested, impartial, and independent." 20 P. L. E., Judges, § 41; 48 C. J. S., Judges, §§ 72, 78 and 85. See also *Dunmore Borough Election*, 299 Pa. 517, 524, 149 A. 733; *McNair's Petition*, 324 Pa. 48, 54, 187 A. 498.

In the present case Schwartz tried to conceal his interest by setting up a corporation and making his wife the nominal owner. Certainly the jury could infer from this alone that he would indirectly receive a benefit. This was his corrupt motive.

In England a magistrate may be prosecuted if he sits in a case in which he has an interest: *King v. Davis*, Lofft 63.

It may be that there is no case in Pennsylvania exactly the same as this one, but, as was so well stated in *Com. v. Mochan*, 177 Pa. Superior Ct. 454, 457, 110 A. 2d 788, "The test is not whether precedents can be found in the books but whether the alleged crimes could have been prosecuted and the offenders punished under the common law." Furthermore, both defendants breached numerous statutes regulating their official actions. Constable Siegel failed to make proper service as required by 42 PS § 422 and 12 PS § 318, and failed to make proper returns of service as required by 12 PS § 355. He also failed to perform the basic duties in levies as required by 42 PS § 233. And Magistrate Schwartz failed to take any steps to hold his active partner Siegel in check. He failed to perform his positive statutory duties as a judge.

It is also argued that the sole proof showing benefit to Magistrate Schwartz came from his own sworn deposition in which he frankly admitted that he received a benefit because he had an opportunity to spend some of the money which his wife, as president of Active Collection Agency, received. From all the other facts proved, the jury could and undoubtedly did infer that Schwartz received a benefit. This was a reasonable inference to be drawn under all the facts and circumstances surrounding them.

It is argued that Schwartz' statement should not have been admitted because he did not have counsel at the time it was taken and because he was not advised of his right to remain silent. Undoubtedly Magistrate Schwartz, who had presided in hundreds of criminal arraignments and hearings, knew that he had the right to counsel and the right to remain silent. Furthermore, Schwartz and 25 other magistrates were interviewed only after they had voluntarily agreed to discuss with the investigators the magisterial system of Philadelphia. Arrangements for these discussions were made through the chief magistrate and through the solicitor to the board of magistrates. He had not been coerced into making any statement and, on the contrary, he frankly admitted that the investigators had been "very, very fair." His argument that the statement was inadmissible because the alleged benefit, which is part of the corpus deliciti in the crimes charged, was not established by separate and independent evidence, is without merit. If Magistrate Schwartz had sold or given his prior collection agency to an outsider rather than to his wife, there might be some substance to this argument. The jury, however, could infer from the fact that he gave it to his wife that he was doing so in order to retain the benefit for himself. His admission of such benefit was not

necessary to prove the corpus delicti in this case. Under all the circumstances the jury could and probably did infer that his statement was given by and with the consent of counsel, who, with the chief magistrate, arrranged for the meeting.

As to Indictment No. 884, it is argued that Magistrate Schwartz could not be held accountable for the improper interest charges awarded and for the award of improper fees and expenses to the constable and for requiring proper returns of service of writs of execution, because these items were entered or performed by either the constable or the magistrate's clerk. The magistrate may not hide behind thse associates. The statute expressly places the duty upon him to do these things or see that they are properly done by his associates.

It is also argued that the conspiracy bill, No. 880, was not proven by sufficient evidence and that there was a failure to produce clear and sufficient evidence as to the alleged conspiracy. The Penal Code, Act of June 24, 1939, P. L. 872, § 302, 18 PS § 4302, provides: "Any two or more persons who falsely and maliciously conspire and agree to cheat and defraud any person of his moneys, goods, chattels or other property, or do any other dishonest, malicious, or unlawful act to the prejudice of another, are guilty of conspiracy . . . ."

The conspiracy is the agreement, combination or common understanding, to do an unlawful act, or to do or commit a lawful act in an unlawful manner: *Com. v. Rosen*, 141 Pa. Superior Ct. 272, 14 A. 2d 833. The heart of the offense is the common understanding, no matter how it came into being: *Com. v. Yobbagy*, 410 Pa. 172, 188 A. 2d 750; *Com. v. Neff*, 407 Pa. 1, 179 A. 2d 630.

". . . evidence to sustain a charge of conspiracy must be 'such as reasonably and naturally justifies an inference

of guilt of the accused and is of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt . . . . A conviction will not be allowed to stand if it is based solely upon suspicions and conjecture.'" *Com. v. Yobbagy*, 410 Pa. 172, 176, 177, 188 A. 2d 750; *Com. v. Evans*, 190 Pa. Superior Ct. 179, 201, 154 A. 2d 57.

At the same time, the acts and conduct of the defendants themselves, done in pursuance of the original scheme, may be considered as proof of the unlawful intent, and the conspiracy may be established by proof of the relation, conduct or circumstances of the parties: *Com. v. Smith*, 151 Pa. Superior Ct. 113, 116, 117, 30 A. 2d 339. Otherwise stated, where the conduct of the parties indicates that they were acting together with a common and corrupt purpose in view, the jury may properly infer that a conspiracy did exist: *Com. v. Albert*, 151 Pa. Superior Ct. 184, 30 A. 2d 184; *Com. v. Rosen*, 141 Pa. Superior Ct. 272, 14 A. 2d 833.

We conclude that the evidence was of such quality and quantity as to prove, beyond a reasonable doubt, that Magistrate Schwartz and Constable Siegel did conspire together to commit the subversion of judicial process charged. It is inconceivable that these two defendants could have operated as closely together as they did, virtually sharing the same office facilities, and with such identity of purpose and design, without there having been a common understanding or agreement existing between them: *Com. v. Cohen*, 203 Pa. Superior Ct. 34, 199 A. 2d 139, cert. denied, 375 U. S. 985. The connection between these two defendants was much more concretely demonstrated than was the case in *Com. v. Reginelli*, 208 Pa. Superior Ct. 344, 222 A. 2d 605, and *Com. v. Price*, 208 Pa. Superior Ct. 354, 222 A. 2d 610.

It is argued that the transfer of ownership of Active Collective Agency to the wife after his election as magistrate shows that Schwartz was acting in good faith to divest himself of any improper interest. If the sale had been to an outsider and not to his wife, this conclusion would undoubtedly follow. The transfer to the wife, however, negatives the idea of good faith and the jury could and probably did infer that this was done so that Schwartz could continue his interest in Active Collection Agency. No judge should be permitted to sit in cases in which he had such an interest and to do so was highly improper.

The evidence was sufficient to sustain the charges as to false pretenses as against both defendants. The Commonwealth proved that the appellants, in legal documents issuing from their public offices, falsely pretended that they were entitled to receive certain arbitrary additions to the sums claimed by plaintiff creditors, fictitious interest, unlawful costs and excessive fees. The Commonwealth also proved that the defendants obtained money by these pretenses and the mere fact that the amounts were not large is immaterial. The Commonwealth also proved that the debtors were defrauded and that the creditors were also defrauded because they did not receive the amounts paid as interest. While the indictments did not specifically charge that the creditors were cheated, the evidence was material and relevant to prove an intent to defraud the debtors because it showed that the interest was not turned over to the creditors, who would have been the only people entitled to receive it. The convictions for false pretenses were adequately sustained by the evidence.

It is also argued that the court erred in excluding from the evidence an alleged custom as to the practices of the magistrates and constables to charge greater amounts for services than the amounts authorized by statute. A custom or usage repugnant to the express provisions of a statute

is void: *Com. v. Ellis,* 46 Pa. Superior Ct. 72, 78; *Allen v. Mack,* 345 Pa. 407, 412, 28 A. 2d 783; *Lanigan v. Lewis,* 210 Pa. Superior Ct. 273, — A. 2d —. The case of *Com. v. Bollinger,* 197 Pa. Superior Ct. 492, 179 A. 2d 253, does not support appellants' argument because in that case the constable was charged with cheating from the county sums in payment for work which had been done, not by him but by his associates. This conduct was not regulated by statute and he was, therefore, permitted to show the custom. In the present case the charges were specifically fixed by statute.

Appellants also argue that the instructions concerning certain evidence which had been excluded were in error. The bills of indictment charging Magistrate Schwartz with conspiracy and malfeasance referred to the impropriety of the magistrate sitting in 28 specified cases which are listed in an attached schedule. In proving the illegality of the magistrate's acts in this respect, the Commonwealth presented detailed evidence as to six of those cases listed. In addition similar evidence was presented over defendants' objections as to nine cases not listed. The trial judge then refused to permit the Commonwealth to introduce evidence of other cases not listed in the indictment for the reason that such evidence would be prejudicial and repetitious. It is argued that the trial judge in his charge erroneously referred to these excluded cases and told the jury that they could consider them. In his argument to the jury counsel for Schwartz stated that the Commonwealth had only produced evidence as to a few of the many civil cases in Magistrate Schwartz' court. In his charge the trial judge reminded the jury that the Commonwealth had attempted the proof of other cases but he was careful to instruct the jury that they could consider these other cases only as they relate to the alleged conspiracy and as they relate to the

issue of design, plan or intent. This was not error: *Com. v. Cohen,* 203 Pa. Superior Ct. 34, 45, 70, 199 A. 2d 139; *Com. v. Raymond,* 412 Pa. 194, 194 A. 2d 150; *Com. v. Grosso,* 192 Pa. Superior Ct. 513, 162 A. 2d 421, affirmed 401 Pa. 549, cert. denied, 365 U. S. 835.

Appellants also argue that the trial court erred in permitting John P. Mason, Esq., the Commonwealth's chief witness, to sit at counsel table and act as associate prosecuting attorney. The record does not indicate that Mr. Mason was a prosecuting attorney in this case. Mr. Mason was merely a witness and he had a perfect right to sit at counsel table, as county detectives often do in the trial of a criminal case.

Appellants also argue that the trial court erred in its instructions to the jury as to reputation evidence in the case against Schwartz. The trial court expressly limited the reputation evidence to the case against Siegel. This was not error under the circumstances surrounding the trial. Schwartz presented no evidence in his defense and therefore gained the tactical advantage of the final speech to the jury. Siegel, however, presented reputation witnesses and the trial judge permitted these witnesses to testify also as to Schwartz' reputation on the theory that two such eminently respectable gentlemen would never conspire to commit a crime. The court charged the jury in this connection as follows: "This evidence was admitted for the limited purpose of establishing in the case against Siegel, that because neither he nor Schwartz were capable of having committed the crimes alleged—in other words, they were of good reputation—that he, Siegel, could not have committed the offense of conspiracy . . . . You may consider this reputation evidence respecting Schwartz, in the light of this principle." We find no error in this charge under the circumstances of this case.

The motion to sever the Siegel case from the Schwartz case was refused and this was within the sound discretion of the trial judge and we find no manifest abuse of discretion or prejudice or clear injustice to the defendant in this regard: *Com. v. Kubacki,* 208 Pa. Superior Ct. 523, 224 A. 2d 80; *Com. v. Patrick,* 416 Pa. 437, 206 A. 2d 295. To have granted separate trials would have entailed a repetition of the same testimony. All the charges grew out of the same occurrences. There was a close relationship between the substantive offenses and the conspiracy which justified a joint trial. In a conspiracy charge defendants should generally be tried together. See *Com. v. Giambrone,* 183 Pa. Superior Ct. 283, 130 A. 2d 254.

It is also argued that all of the indictments were illegal because the attorney general had no right to investigate the magisterial system of Philadelphia absent a formal request by the Board of Judges of the Common Pleas Courts of Philadelphia. We can see no error in this respect: *Com. ex rel. Minerd v. Margiotti,* 325 Pa. 17, 188 A. 524; *Margiotti Appeal,* 365 Pa. 330, 75 A. 2d 465; *Com. v. Fudeman,* 396 Pa. 236, 152 A. 2d 428; *Com. v. Wheeler,* 200 Pa. Superior Ct. 284, 189 A. 2d 291.

Judgments of sentence affirmed and the defendants are directed to appear in the court below at such time as they may be there called, and that they be by that court committed until they have complied with the sentences, or any part of them which had not been performed at the time the appeals were made a supersedeas.

HOFFMAN, *J.*, took no part in the consideration or decision of this case.

PETITION FOR ALLOWANCE OF APPEAL FROM THE SUPERIOR COURT.

1. Appellant, HARRY C. SCHWARTZ, is a duly elected Magistrate of the City of Philadelphia. Appellant ABRAHAM SIEGEL is a duly elected Constable of the City of Philadelphia.

2. The prosecution below arose out of the special probe of the Philadelphia magisterial courts conducted by the Attorney General of the Commonwealth of Pennsylvania during the fall and winter 1964-65.

3. Appellants were indicted on a total of twenty-one separate bills of indictment for various offenses relating to their activities as magistrate and constable and were tried together in the Court of Quarter Sessions of Philadelphia County before the Honorable John J. McDevitt and a jury, commencing April 12, 1966.

4. On April 20, 1966, the jury returned a verdict finding appellants guilty on the following charges:

(a) Magistrate Schwartz:

(i) Malfeasance, misbehavior in office and official oppression in disposing of small claims brought before him by co-defendant Constable Abraham Siegel and Active Collection Agency, Inc. with knowledge that his wife was an officer and principal shareholder of the said corporation. Bill Nos. 881-885 (20a-25a).

(ii) False pretenses in permitting Constable Siegel to assess certain charges in executing the judgments entered against the debtors in these cases. Bill Nos. 891, 892, 897, 905 (26a-29a, 34a-35a, 40a-41a).

(iii) Conspiracy with Constable Siegel to commit the above offenses. Bill No. 880 (17a-19a).

(b) Constable Siegel:

False pretenses in assessing certain charges in the execution of judgments entered against debtors by his co-defendant Magistrate Harry C. Schwartz in small claims brought before the Magistrate by appellant Abraham Siegel and Active Collection Agency, Inc., Bill Nos. 893, 896, 898, 900 (30a-33a, 36a-39a).

Conspiracy with Magistrate Schwartz to commit various offenses relating to the handling and disposition of small claims by appellants Abraham Siegel and Harry C. Schwartz. Bill No. 880 (17a-19a).

5. Appellants' motions for arrest of judgment and for new trial were denied by the Court below on December 7, 1966 (80a-106a). Appellants were sentenced on December 14, 1966 to terms of imprisonment in the Philadelphia County Prison of 11 to 23 months and the payment of $10,000 fine in the case of Magistrate Schwartz and a $5,000 fine in the case of Constable Siegel (107a-08a).

6. Appellants thereafter appealed to the Superior Court of Pennsylvania as of October Term, 1967, Nos. 227-241, and that Court affirmed the judgment of sentence of the Court below in an opinion filed on September 14, 1967, a copy of which is attached hereto as Exhibit "A".

7. The principal evidence introduced at the trial concerned the handling and collection of a number of small claims by Constable Siegel and Active Collection Agency, Inc. by the institution of proceedings in Magistrate Schwartz' Court. Active Collection Agency, Inc., which was originally a sole proprietorship operated by Magistrate Schwartz when he was a constable, was incorporated upon his election as magistrate with Constable Siegel and Magistrate Schwartz' wife, Lillian, as its stockholders and officers (182a-93a). In general, the amounts collected by Constable Siegel and Active Collection Agency, Inc. included the principal debt, interest in the amount of $1.50, $2.50,

$3.50 and $4.50 and costs for service of summons of $7.50 or $9.00. In one instance, an additional sum of $5.00 was added to the amount of the debt by Constable Siegel (483a-90a).

John P. Mason, the Special Assistant Attorney General, who participated in the investigation of the magisterial system (and who acted as an associate prosecuting attorney), testified as a witness as to the proper amount of costs allowable for service of summons ($2.50 for the city; $2.50 plus mileage for the constable) (396a-401a, 754a). A state policeman further testified as to the various mileages to the residences of the several debtors (721a-39a, 852a-60a).

The Court refused to permit cross-examination (219a, 430a, 442a-47a), or the introduction of evidence (891a-97a), as to the custom among constables, and its approval by public officials, to impose additional charges, including the amounts of $7.50 (for one defendant) and $9.00 (for two defendants) as costs for service of summons, unless the constable took the stand to testify

The amount of the overcharges involved in each instance set forth in the bills of indictment charging false pretenses are as follows:

Name of Debtors	*Bill of Indictment No.*	*Interest*	*Costs*	*Extras*	*Total*
Cybulsky	892,893	$1.50	$2.72		$ 4.22
Eisley	891,896	$2.50	$2.56		$ 5.06
Huston	897,898	$2.50	$2.90	$5.00	$10.40
Granoff	900,905	$2.50	$1.82		$ 4.32
		$9.00	$10.00	$5.00	

Total for all four counts against both defendants $24.00

The facts are more fully set forth in appellants' Statement of Case in their Brief before the Superior Court, copies of which accompany this Petition.

8. The questions raised by these appeals are as follows:

(a) Did Magistrate Schwartz' conduct in disposing of valid small claims brought before him by a collection agency in which his wife was an officer and stockholder constitute an indictable common law offense, in view of the lack of statutory or judicial precedent designating such conduct as criminal?

(b) Was there substantial evidence in the record to sustain appellants' conviction on any of the charges alleged in the bills of indictment, particularly that of Conspiracy?

(c) Did the court below err in excluding evidence of custom in the City of Philadelphia as to amounts charged by Constables in small claims cases?

(d) Was the entire proceeding below illegal as arising out of an unauthorized common law investigation by the Attorney General of the Commonwealth of Pennsylvania?

(e) Did the court below err by referring in its charge to crimes not alleged in the bills of indictment, since evidence of these crimes had been excluded during the trial?

(f) Did the court below err in permitting John P. Mason, Esquire, one of the Commonwealth's chief witnesses to sit at counsel table and act as an associate prosecuting attorney during the course of the trial?

(g) Did the court below err in failing to instruct the jury to consider the testimony as to Magistrate Schwartz' reputation introduced in Constable Siegel's case as evidence in Magistrate Schwartz' case?

(h) Did the court below err in permitting the Commonwealth to introduce into evidence the transcript of unsworn statement made by Magistrate Schwartz to Special Assistant Attorney Generals Arlen Specter and John P. Mason during the magisterial probe without having been advised of his rights to counsel or to remain silent?

(i) Did the court below err in refusing to grant Constable Siegel's motion for a separate trial?

9. Appellants request that this Court allow an appeal from the decision of the Superior Court of Pennsylvania for the following reasons:

(a) The decision of the Superior Court (Exhibit "A", pp. 10-14) that the conduct of Magistrate Schwartz was indictable as a common law offense constitutes a judicial extension of the common law crimes charged in the indictments to completely novel circumstances which have not heretofore been expressly prohibited by this Court or the General Assembly of Pennsylvania and should, therefore, be reviewed by this Court. It is submitted that such an extension of the common-law offenses, *without prior* judicial or legislative sanction is contrary to the ex post facto and due process clauses of the *United States and Pennsylvania Constitutions* and should not be sustained by this Court.

(b) The decision of the Superior Court (Exhibit A, pp. 16-17) that there was sufficient evidence to sustain appellants' conviction on the conspiracy indictment is *con-*

trary to this Court's decision in *Commonwealth v. Yoblagy*, 410 Pa. 172 (1963).

(c) The decision of the Superior Court (Exhibit A, p. 18) that evidence of custom in the costs and fees charged by Constables in the City of Philadelphia was properly *excluded* because Constable's costs were regulated by statute is *directly contrary* to this Court's opinion in *Commonwealth v. Trunk*, 311 Pa. 555 (1933), which expressly stated that conduct of public officials can be justified on the basis of custom although such conduct was in violation of a *statutory* mandate.

(d) The decision of the Superior Court (Exhibit A, p. 21) that the Attorney General of Pennsylvania possessed the common law power to investigate the Philadelphia magisterial system rests upon a legal principle recently questioned by this Court in its opinion in *Smith v. Gallagher*, 408 Pa. 551, 605 (1962) and should be reviewed by this Court.

(e) The remaining issues resolved by the Superior Court also raise novel questions of law which should be considered by this Court.

10. Copies of appellants' Brief and Record in the Superior Court accompany this Petition.

WHEREFORE, petitioner prays that he be allowed to appeal from the judgment of the Superior Court to the Supreme Court of Pennsylvania.

MARVIN COMISKY,
Marvin Comisky,
EDWIN P. ROME,
Edwin P. Rome,
Attorneys for Appellants.

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT.

No. 131, JANUARY TERM, 1968.

APPEAL FROM THE ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA TO NOS. 227-241 OCTOBER TERM, 1967, AFFIRMING JUDGMENTS OF THE COURT OF QUARTER SESSIONS OF PHILADELPHIA COUNTY TO NOS. 880-885, 891-893, 896-898, 900, 905, JANUARY SESSIONS, 1966.

ENTERED: OCTOBER 17, 1967.

COMMONWEALTH OF PENNSYLVANIA

v.

HARRY C. SCHWARTZ

AND

ABRAHAM SIEGEL,

Appellants.

OPINION.

PER CURIAM: FILED: November 14, 1968

The court being equally divided the order of the Superior Court is affirmed.

Mr. Justice Cohen files a dissenting opinion.

Mr. Justice Roberts files a dissenting opinion in which Mr. Justice O'Brien joins.

Mr. Justice Musmanno did not participate in the decision of this case.

DISSENTING OPINION.

COHEN, *J* FILED: November 14, 1968

I conclude that the Attorney General improperly superseded the District Attorney.

I dissent.

DISSENTING OPINION.

ROBERTS, *J.* FILED: November 14, 1968

The majority, in failing to grant appellant Siegel a new trial, ignores two recent Supreme Court decisions. During the course of the trial the Commonwealth introduced Magistrate Schwartz's unsworn statement which inculpated Constable Siegel. It is conceded that cautionary instructions were given to the jury warning them to disregard Schwartz's statement in evaluating the Commonwealth's case against Siegel. Further, under the rule originally established in *Della Paoli v. United States*, 352 U. S. 232, 77 S. Ct. 294 (1957), it was assumed that a properly instructed jury would ignore the confessor's inculpation of the nonconfessor in determining the latter's guilt. If followed from this assumption, that there could be no violation of the nonconfessor's right to confrontation, because the case was treated as if the confessor had made no statement inculpating the nonconfessor.

However, in *Bruton v. United States*, — U. S. —, 88 S. Ct. 1620 (1968), the Supreme Court expressly overruled *Della Paoli*, and held that because of the substantial risk that the jury might look to the confessor's statements in determining the nonconfessor's guilt, any admission of such a statement in a joint trial violated the nonconfessor's right of cross-examination as guaranteed by the confronta-

tion clause of the sixth amendment. The Supreme Court opinion states: "Despite the concededly clear instructions to the jury to disregard Evans' [Bruton's codefendant's] inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination.

The facts in the instant appeal are so similar to those in *Bruton* that they clearly compel a new trial for appellant Siegel. Schwartz made implicating statements, never took the stand and therefore was not subject to cross-examination. Although it might be contended that Schwartz' statements did not prejudice Siegel, even the Commonwealth in its brief concedes that this was possible by noting that: "There was nothing in the statement which implicated Siegel which had not already been proved aliunde." Nor can a valid argument be made that because the damaging evidence in Schwartz' statement was also proved elsewhere, the error in introducing the statement at Siegel's trial was harmless. This Court has clearly enunciated that in order to prove "harmless error, the Commonwealth must now demonstrate, beyond a reasonable doubt, that there was no reasonable possibility that the evidence complained of might have contributed to the conviction." *Commonwealth v. Pearson*, 427 Pa. 45, 49, 233 A. 2d 552, 554 (1967). A cursory glance at the record indicates that it would be impossible for the Commonwealth to meet this burden. Since the Supreme Court has declared that *Bruton* is completely retroactive, *Roberts v. Russell*, — U. S. —, 88 S. Ct. 1921 (1928), it seems clear to me that it is incumbent upon this Court to award Siegel a new trial.

Therefore I dissent.

Mr. Justice O'Brien joins.

IN THE

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT.

No. 131, JANUARY TERM, 1968.

APPEAL FROM THE ORDER DATED OCTOBER 17, 1967, OF THE SUPERIOR COURT OF PENNSYLVANIA TO NOS. 227-241, OCTOBER TERM, 1967, AFFIRMING JUDGMENTS OF THE COURT OF QUARTER SESSIONS OF PHILADELPHIA COUNTY TO NOS. 880-885, 891-893, 896-898, 900, 905, JANUARY SESSIONS, 1966.

COMMONWEALTH OF PENNSYLVANIA

v.

HARRY C. SCHWARTZ,

AND

ABRAHAM SIEGEL,

Appellants.

PETITION FOR REARGUMENT.

To the Honorable, the Chief Justice and Associate Justices of the Said Court:

The Petition of appellants, Harry C. Schwartz and Abraham Siegel, by their attorneys, respectfully represents:

HISTORY.

1. This appeal arises out of the conviction of appellants Harry C. Schwartz, a duly elected Magistrate of the City of Philadelphia, and Abraham Siegel, a duly elected Constable of the City of Philadelphia, of the following alleged offenses relating to their conduct in public office:

a. Magistrate Schwartz:

(i) Malfeasance, misbehavior in office and official oppression in disposing of small claims brought before him by co-defendant Constable Abraham Siegel and Active Collection Agency, Inc., with knowledge that his wife was an officer and principal shareholder of the said corporation. Bill Nos. 881-885 (Rec. 20a-25a).

(ii) False pretenses in permitting Constable Siegel to assess certain charges in executing the judgments entered against the debtors in these cases. Bill Nos. 891, 892, 897, 905 (Rec. 26a-29a, 34a-35a, 40a-41a).

(iii) Conspiracy with Constable Siegel to commit the above offenses. Bill No. 880 (17a-19a).

b. Constable Siegel:

(i) False pretenses in assessing certain charges in the execution of judgments entered against debtors by his co-defendant Magistrate Harry C. Schwartz in small claims brought before the Magistrate by appellant Abraham Siegel and Active Collection Agency, Inc., Bill Nos. 893, 896, 898, 900 (Rec. 30a-33a, 36a-39a).

(ii) Conspiracy with Magistrate Schwartz to commit various offenses relating to the handling and disposition of small claims by appellants

Abraham Siegel and Harry C. Schwartz. Bill No. 880 (Rec. 17a-19a).

2. These changes emanated from the special probe of the Philadelphia magisterial courts conducted by the Attorney General of the Commonwealth of Pennsylvania during the fall and winter 1964-65.

3. Appellants were tried *together* in the Court of Quarter Sessions of Philadelphia County before the Honorable John J. McDevitt and a jury, commencing April 12, 1966, and a verdict of guilty was returned on the above bills of indictment on April 20, 1966.

4. Appellants' motions for arrest of judgment and for new trial were denied by the Court below on December 7, 1966 (Rec. 80a-106a). Appellants were sentenced on December 14, 1966 to terms of imprisonment in the Philadelphia County Prison of 11 to 23 months, and the payment of $10,000 fine in the case of Magistrate Schwartz and a $5,000 fine in the case of Constable Siegel (Rec. 107a-08a).

5. Appellants thereafter appealed to the Superior Court of Pennsylvania as of October Term, 1967, Nos. 227-241, and that Court affirmed the judgment of sentence of the Court below in an opinion filed on September 14, 1967 (Supp. Rec. 1b-22b).

6. This Court granted appellants' Petition for Allowance of Appeal by order dated September 29, 1967 (Supp. Rec. 37b), and oral argument was heard *before the seven judges then constituting this Court on January 4, 1968.*

7. On November 14, 1967, this Court filed a per curiam opinion stating, "the Court being equally divided, the order

of the Superior Court is affirmed." Dissenting opinions were filed by Mr. Justice Cohen and by Mr. Justice Roberts, in which Mr. Justice O'Brien joined. The opinion noted that Mr. Justice Musmanno, who had died on October 12, 1968 (and who sat with the Court at the time of oral argument), "did not participate in the decision of this case", causing the equally divided Court.

EVIDENCE.

8. The principal evidence introduced at the trial concerned the handling and collection of a number of small claims by Constable Siegel and Active Collection Agency, Inc. by the institution of proceedings in Magistrate Schwartz' Court. Active Collection Agency, Inc., which was originally a sole proprietorship operated by Magistrate Schwartz when he was a constable, was incorporated upon his election as magistrate with Constable Siegel and Magistrate Schwartz' wife, Lillian, as its stockholders and officers (Rec. 182a-93a).

In general, the amounts collected by Constable Siegel and Active Collection Agency, Inc., included interest and costs for service of summons of $7.50 or $9.00 instead of the $5.00 plus mileage allowed by statute (Rec. 396a-401a, 754a). In one instance, an additional sum of $5.00 was added to the amount of the debt by Constable Siegel (Rec. 483a-90a). The amount of the alleged overcharges involved in all of the instances set forth in the bills of indictment charging false pretenses *totalled $24.00* (Appellnats' Brief, p. 6).

The Court refused to permit cross-examination (Rec. 219a, 430a, 442a-47a), or the introduction of evidence (Rec. 891a-97a), as to the custom among constables, and its approval by public officials, to impose additional charges, in-

cluding the amounts of $7.50 (for one defendant) and $9.00 (for two defendants) as costs for service of summons, unless the *constable took the stand to testify.* It also refused to permit this same evidence on behalf of Magistrate Schwartz, even though in practical effect he had taken the stand, because of an admission by him on this issue read into the testimony.

The Court permitted to be introduced into evidence testimony by Mr. Mason as to certain statements made by Magistrate Schwartz during his examination by the Special Assistant District Attorney General with regard to his relationship with Mr. Siegel (Rec. 819a-41a), merely instructing the jury that "the information contained in the transcript may not be considered or used in any respect against Constable Siegel, even though Constable Siegel's name may appear from time to time in it (Rec. 804a).

The facts are more fully set forth in appellants' Statement of Case in their Brief before this Court.

QUESTIONS ON APPEAL.

9. The questions raised by these appeals are as follows:

(a) Did Magistrate Schwartz' conduct in disposing of valid small claims brought before him by a collection agency in which his wife was an officer and stockholder constitute an indictable *common law offense*, in view of the lack of statutory or common law precedent designating such conduct as criminal?

(b) Was there substantial evidence in the record to sustain appellants' conviction on any of the charges alleged in the bills of indictment, particularly that of conspiracy?

(c) Did the court below err in excluding evidence of custom in the City of Philadelphia as to amounts charged by constables in small claims cases?

(d) Was the entire proceeding below illegal as arising out of an unauthorized common law investigation by the Attorney General of the Commonwealth of Pennsylvania?

(e) Did the court below err by referring in its charge to crimes not alleged in the bills of indictment, since evidence of these crimes had been excluded during the trial?

(f) Did the court below err in permitting John P. Mason, Esquire, one of the Commonwealth's chief witnesses, to sit at counsel table and act as an associate prosecuting attorney during the course of the trial?

(g) Did the court below err in failing to instruct the jury to consider the testimony as to Magistrate Schwartz' reputation introduced in Constable Siegel's case as evidence in Magistrate Schwartz' case?

(h) Did the court below err in permitting the Commonwealth to introduce into evidence the transcript of unsworn statement made by Magistrate Schwartz to Special Assistant Attorney Generals Arlen Specter and John P. Mason during the magisterial probe without having been advised of his rights to counsel or to remain silent?

(i) Did the court below err in refusing to grant Constable Siegel's motion for a separate trial in view of the introduction into evidence of Magistrate Schwartz' statement inculpating him?

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REASONS FOR REARGUMENT.

10. Appellants request that this Court grant a reargument with respect to these issues for the following reasons:

(1) The decision of this equally divided Court, in condoning the admission of Magistrate Schwartz' unsworn statement inculpating his codefendant Constable Siegel, is directly *contrary* to *two* recent decisions of the United States Supreme Court. *Bruton v. United States,* 391 U. S. 123 (1968); *Roberts v. Russell,* 392 U. S. 293 (1968).

In *Bruton,* the Court held that the introduction into evidence at a joint trial of the statement of one codefendant which inculpates a second defendant constitutes a violation of the second defendant's constitutional right of confrontation. The opinion expressly repudiated the rule of *Delli Paoli v. United States,* 352 U. S. 232 (1957), relied upon by the courts below, that statements of this sort were admissable provided that the jury was instructed to disregard the statement as to the second defendant (391 U. S. at 135-137):

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant . . . are deliberately spread before the jury in a joint trial . . .
>
> "[I]n the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The

effect is the same as if there had been no instruction at all."

In *Roberts,* the Court held that the constitutional principles enunciated in *Bruton,* a federal court proceeding, were equally applicable to *state* court proceedings under the Due Process Clause of the 14th Amendment to the United States Constitution, and were further applicable *retroactively* to criminal trials conducted prior to the *Bruton* opinion.

It has been appellants' position throughout the course of these proceedings that the binding instructions of the trial court herein were legally insufficient and that the admission of Magistrate Schwartz' statement into evidence at the joint trial was improper for the exact same reasons as were stated by the Supreme Court in *Bruton* and *Roberts. These decisions require the reversal of the judgments below and the grant of new and separate trials to appellants.*

At the very least, since the decisions in *Bruton* and *Roberts* was handed down by the United States Supreme Court subsequent to oral argument of the matter before this Court, appellants should be granted a rehearing for the purposes of arguing the effect of these decisions on the instant case.

(2) Appellants argued their appeals before a full constitutional seven-judge court, and are entitled to have the matter decided by the *full court.* Article V, § 1 of the Pennsylvania Constitution (Article V, § 2 of the revised Judiciary Article which becomes effective January 1, 1969) provides for a seven-judge court and there is no constitutional or statutory provision authorizing the Court to act with less than seven judges or to render a decision other

than by a majority vote of four. This is particularly of moment in this case because of the facts that the six judges who participated in the decision of the Court were evenly divided. Therefore, there is a very real possibility that a seven-judge court would render a different decision than that mandated by the equally divided six-judge court. Moreover, the per curiam opinion of the six-judge court disposes of this appeal and overrules prior opinions of this Court without setting forth any reason for this action, whereas a decision by a seven-judge court, resulting in a full opinion, would constitute a definitive adjudication by this Court of the substantial legal questions presented by this appeal.

(3) The principles of due process and the presumption of innocence which underlie our criminal procedure preclude the affirmance of the judgments below by a divided vote. The Commonwealth has the burden in a criminal matter of proving the factual elements of guilt beyond a reasonable doubt. This is a burden which continuously remains on the Commonwealth until final adjudication by a court of last resort. Thus the Commonwealth should have the burden of convincing a *constitutional majority* of this Court that there is no legal deficiency, in substance or in procedure, with respect to the verdict reached by the jury. This issue clearly could not have been anticipated and therefore was not briefed nor argued. It raises, nonetheless, a fundamental constitutional question under the Constitutions of the United States and of Pennsylvania and should alone, we submit, mandate a reargument.

(4) The Court in affirming, per curiam, by a divided vote, the exclusion of custom evidence offered by defendants to show lack of criminal intent, overruled its prior

unanimous decision in *Commonwealth v. Trunk*, 311 Pa. 555 (1933), a precedent of long standing which had been unchallenged until the decision of the Superior Court herein. In effect, the instant decision removes "intent" as an essential element of the offenses charged herein, which under all of the applicable decisions require proof of an act *and an intent*. We submit, a result of this magnitude should only be effected by a constitutional majority of the Court in a full opinion stating the Court's reasons for the overruling of its prior decision and for the abandonment of the fundamental principle of criminal law requiring proof of intent, as well as an act.

(5) The Court in affirming the judgments below, per curiam, by a divided vote, has failed to pass upon the very substantial issues raised by this appeal, which are enumerated at paragraph 9 below, including inter alia: (a) the legality of the Philadelphia Magistrates Probe conducted by the Attorney-General of the Commonwealth of Pennsylvania, and (b) the ex post facto judicial creation of a new crime with respect to Magistrate Schwartz' conduct contrary to the Due Process Clause of the 14th Amendment to the United States Constitution. These issues are of great public importance, having continuing significance in the administration of criminal justice, and should not be disposed of by less than a full court. Rather, they require a decision by a full seven-judge court.

11. Copies of the per curiam opinion of this Court affirming the order of the Superior Court and of the dissenting opinions of Justices Roberts and Cohen are attached hereto.

WHEREFORE, appellants Harry C. Schwartz and Abraham Siegel, respectfully request the Court to grant a re-

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argument in the above appeals before a full constitutional seven-judge court and to retain this matter within its jurisdiction until that reargument can be had.

MARVIN COMISKY,
Marvin Comisky,
EDWIN P. ROME,
Edwin P. Rome,
Attorneys for Appellants.

Endorsement:

1/8/69 Denied
Per Curiam

EXCERPTS FROM NOTES OF TESTIMONY.

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JOHN P. MASON, ESQ., recalled.

The Court: Mr. Mason, I understand, is on the stand strictly as a reader. In other words, to read the answers alleged to have been made by the defendant, Magistrate Schwartz?

Mr. Sprague: Yes, except, I said I will ask him the one question in terms of drinking.

The Court: All right.

Mr. Rome: Sir, may the record note my objection—in your Honor's previous instructions—now to that which is going to be adduced here?

The Court: That is correct.

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Mr. Kanner: Your Honor, I also object for the constitutional reasons which I raised before, your Honor, and for that reason I object to any reference to this testimony, and I did make a prior motion which I ask be effective now, which your Honor has ruled upon.

The Court: Yes. Mr. Kanner's motion is overruled.

DIRECT EXAMINATION.

* * *

Mr. Sprague: Now, members of the jury, we are going to read from parts of the deposition here and I am going to read, if it is agreed to, certain questions that were asked of Magistrate Schwartz, and Mr. Mason will read the answers that

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were given.

* * *

By Mr. Sprague:

Q. Starting on Page 55:

"Q. Let me start out by asking you when you first went into the collection agency business, if you did at all?

"A. I got the name of Active Collection Agency from a telephone book in Miami Beach, Florida a number of years ago. I took that name because it was the first name that appeared under 'Collection Agencies'. And that's why it is first in the Philadelphia phone book.

Now, the year I went into business at Active Collection Agency I think was 1953. That is correct. Because I split a partnership with a man by the name of Herman J. Kates—may he rest in peace. We had a

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Broad Street Collection Agency besides being Constables. I gave Herman everything that he wanted, including the name. I gave him the full value of whatever we spent for the articles he took out of the office, the desks, the typewriters, whatever he wanted. Whatever he didn't want, I paid for. The same amount of money that we paid originally. No depreciation. That's when I got my attorney, Councilman Bellis, to enter the name under the Fictitious Names Act.

"Q. Was that a corporation or was that just a fictitious name?

"A. That was a fictitious name. Active Collection Agency. And its purpose was this. The jurisdiction of a Constable is $100. I couldn't handle a claim under (sic) $100. I mean over $100, not less. I was a collection agency.

"Q. Was there any other interested party in the Active Collection Agency at that time besides you?

"A. If I remember right, it was Harry C. Schwartz individually trading as Active Collection Agency.

"Q. Now, did you later on form a corporation with that name?

"A. We formed a corporation in that name immediately after I became a Magistrate.

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"Q. And who were the shareholders of that corporation?

"A. The shareholders of that corporation—I do not hold any shares myself. My wife has the controlling interest in the voting shares.

"Q. Are there some other divisions in the shares into family interest which——

"A. (Interposing) Yes. I don't remember whether it's my daughter or my son-in-law who hold the other shares. It's the voting shares.

"Q. These are voting shares?

"A. Yes. The nonvoting shares are also controlled by my wife and Abe Siegel. I don't remember whether Abe has any or not. But I think the C. P. A. Sidney B. Goldstein may have a share. I think Isadore H. Bellis may have a share. I think he is an officer of the corporation.

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"Q. And who are the other officers of the corporation?

"A. My wife.

"Q. And what office does she hold?

"A. She is the president. I don't remember whether Siegel is the secretary and treasurer or vice president and secretary or something like that. I don't know. I

[817]

think Bellis is an officer. My two son-in-laws—I don't remember if my two sons-in-law are on there. I think Mr. Fred Visor and—V-i-s-o-r—Frederick C. Visor and my youngest son-in-law would not be on there. Because I don't think they were married at that time. No, they were not. Wait a minute, sure they were. Sure they were. We incorporated in 1961. January 1, 1961. Because I became Magistrate December 23, 1960. So it was incorporated immediately after I became a Magistrate.

"Q. Now, has the stock ownership of the corporation changed at any time since it was incorporated?

"A. No, not that I know of.

"Q. And who are the directors of the corporation?

"A. They would be any one of those names. Or all of them.

"Q. So essentially it's a closed corporation?

"That's right.

"Q. A family corporation?

"A. I think we made a mistake. In the sense that having two classes of stock, voting stock and non-voting stock being in distinctive categories as far as taxwise.

"Q. You can't be a Sub Chapter S corporation in that situation?

"A. I don't know what the title is but the purpose

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of incorporation it, if I remember correctly, was to treat this as a simple partnership between my wife and Siegel. So that we could file as a copartnership, but it didn't turn out that way. It worked out that we had to file as a corporation.

"Q. You did file as a Sub Chapter S corporation?

"A. I don't even know what that is.

"Q. That is a corporation started as a partnership or it must by class only have one class of stockholder.

"A. See, we have two classes of stockholder. We—my wife employs two C. P. A.'s, Sidney Goldstein and Abbey Accounting Service at 6055 York Road.

"Q. Is there an underlying arrangement between Mrs. Schwartz and Constable Siegel for division of the profits in a more or less partnership arrangement or what is the arrangement there, if any?

"A. Mr. Siegel came to work for me in September, 1953. At the magnificent sum of or munificent of $50 per week. And when I became a Magistrate his—I'll tell you the truth, his salary went up in leaps and bounds because that was terrific salvation not only to myself but to every member of my family, and I don't restrict it to 9:00 to 5:00. I mean twenty-four hours a day seven days a week. Today since I became a

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Magistrate that man has fifty percent of the profits.

"Q. Does he hold—but he doesn't hold fifty per cent of the stock?

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"A. No, sir. It's truly a what you call a Horatio Alger story from $50 a week up to about $20,000.

"Q. And the offices of the collection agency are located where?

"A. 2307 North Broad Street."

Mr. Sprague: Now I am turning to Page 110.

"Q. Magistrate Schwartz, does Mr. Schwartz perform any services at all for the collection agency?

"A. Sometimes yes. Sometimes no. It's just according if my wife wants to come down here and help me, too.

"Q. What sort of things does she do for the collection agency, if any? Or to state it differently, are her services more of a minimal nature, if she ever does participate?

"A. I would say so, that's right.

"Q. Abe Siegel really runs the business?

"A. Abe Siegel really runs the business. There's no question about that, sir.

"Q. Does she have any regular hours, for example,

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when she goes to the collection agency?

"A. No, sir."

Mr. Sprague: Now turning to Page 158.

"Q. What is your practice with regard to having the amount of the debt and the costs noted on the summons? I notice in some instances in other cases they are noted, but in none of these is there any indication on the summons itself of the amount of interest on the debt and costs.

"A. Well, it is just a collection gag, that's all. There are two ways. You either don't exhibit the correct amount or you exhibit a greater amount than what they owe. You have to get a reaction. You want to collect the money. If you're working for a percentage, that's the way you collect money.

"I wanted to add something but it slipped my mind. I think it will be interesting. It will come to me. I'll tell you."

Mr. Sprague: Now Page 188.

"Q. You anticipated me because I note that these jackets from Bell Telephone all have the letters 'PCB'—at least this batch that I have in my hand—up at the top. And then 'ACA' down under the real debt on the face of the jacket.

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"A. That's exhibiting to me that it comes from Active Collection Agency. Why the girl put it on that way—back in the Bell office they always say 'By ACA.' 'PCB by ACA.'

"Q. Does that indicate that the Philadelphia Credit Bureau had these claims for collection and then forwarded them to Active Collection Agency?

"A. Do yon have any idea how much money is taken over to Philadelphia Credit Bureau a month from that agency?

"Q. Yes, I would like to know.

"A. I'm sorry—I don't know. It's a goodly amount, sir.

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"Q. When Active gets these Bell Telephone Company cases——

"A. (Interposing) Siegel gets the Bell Telephone Company cases. It isn't the Active Collection Agency, because the Philadelphia Credit Bureau has a collection agency. They don't give the claims to the Active, they give them to the constable. And do you want to know something? They still mention it to me. I'm the one that's going to be responsible if anything goes wrong because they trust me.

"Q. Let me ask you this, sir. As you are familiar

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with these Bell Telephone cases,——

"A. (Interposing) Somewhat.

"Q. (Continuing)—at what point of time is the—at Bell Telephone or PCB or Siegel is the determination made to add interest to the phone company bill?

"A. Well, the fact that they add interest is merely to try to collect the claim. They make the claim greater than what it is by the addition of interest. The fact that the interest may or may not be collected you're not interested in.

"Q. Well, what I want to know is which entity determines that that interest is to be tacked on to make that claim more collectible?

"A. It isn't the Bell Telephone Company if that's what you want to hear. It isn't——

"Q. (Interposing) All right.

"A. (Continuing)—the Bell Telephone Company but at the same time, sir,——

"Q. (Interposing) Is it PCB?

"A. No, sir. It isn't the PCB, either.

"Q. Is it Siegel?

"A. It's Siegel's office that adds on the interest. But I repeat, you do not know whether that interest is collected or not.

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"Q. Would it surprise you, sir, to find out that in many instances——

"A. (Interposing) They are collected?

"Q. (Continuing)—interest is collected?

"A. Yes, sir. I'm not surprised. I'm not surprised."

Mr. Sprague: Now let's turn to Page 100—starting with the question at the bottom of Page 99.

"Q. The question is, as we come back on the record, Magistrate Schwartz has just answered the question in the terms of what I'm driving toward, in terms of motivation. Will you repeat that last answer for me?

"A. It's a peculiar thing, regardless of what I say, I'm going—whether it's a violation of the Act, the Magistrates Act or not, I don't know. Some say yes, some say no. I handle all this business for one reason. If my wife makes money, I'm going to benefit by it because I have an opportunity to spend some of the money she makes, being the president of the company that employs the Constable who handles the work.

"Q. In other words, your wife, the collection agency, has part of the work and gets part of the costs and your wife has an interest in the company?

"A. Sure, she has part of the stock.

"Q. So she gets half of the profits and that goes

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back to benefit the family situation and you through that arrangement?

"A. That's right. It can't be otherwise. I couldn't give you a different answer if I stood on my head."

Mr. Sprague: Cross-examine.

• • •

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IN THE

Supreme Court of the United States

October Term, 1968.

No. 83 ~~1840, Miscellaneous.~~

HARRY C. SCHWARTZ and ABRAHAM SIEGEL,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENT IN OPPOSITION

JAMES D. CRAWFORD,
Assistant District Attorney,
Chief, Appeals Division,
RICHARD A. SPRAGUE,
First Assistant District Attorney,
ARLEN SPECTER,
District Attorney.

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Philadelphia, Pa. 19107

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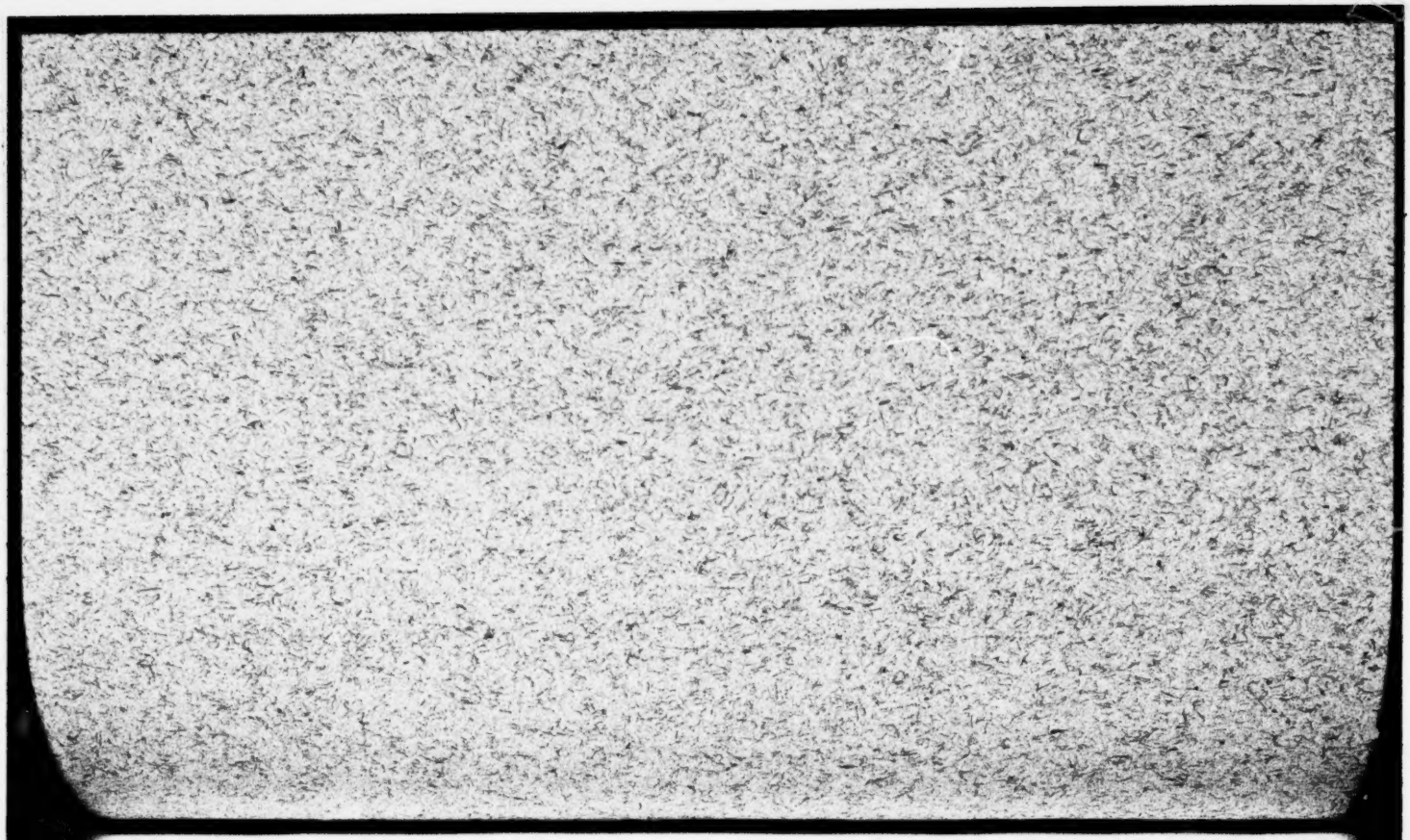

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JURISDICTION.

Petitioners assert that jurisdiction of this Court is invoked under 28 U. S. C. §1257 (3). Respondent contends that, except with respect to question one on behalf of petitioner Siegel, this case presents no questions involving any right, privilege, or immunity set up under the Constitution of the United States.

QUESTIONS PRESENTED.

1. Did the admission into evidence at petitioners' joint trial of the unsworn statement of petitioner Schwartz, which contained some mention of petitioner Siegel, constitute a violation of petitioner Siegel's constitutional rights under the due process clause of the fourteenth amendment to the United States Constitution and under the sixth amendment of the United States Constitution despite the paucity of references, presence of limiting instructions, and overwhelming evidence against petitioner Siegel?

2. Did the conviction of petitioner Harry Schwartz of the common law offenses of misbehavior in office, official oppression and malfeasance as a magistrate of the City of Philadelphia constitute a violation of petitioner's constitutional rights under the ex post facto and due process clauses of the United States Constitution despite the fact that these crimes had long existed in Pennsylvania?

3. Did the affirmance by the Pennsylvania Supreme Court of petitioner Siegel's convictions by an equally divided vote of 3-3, violate petitioner's constitutional rights under the fourteenth amendment to the United States Constitution?

STATEMENT.

Having been tried to a jury before the Honorable John J. McDevitt of the Court of Quarter Sessions of Philadelphia County, one or both of petitioners Harry C. Schwartz and Abraham Siegel were found guilty on fourteen indictments charging cheating by false pretense, conspiracy and malfeasance in office. The crimes charged in the indictments were committed while petitioner Schwartz was a magistrate and petitioner Siegel a constable.

The gist of the charges was that petitioners had conspired to abuse the powers of their respective offices to cheat, defraud and extort defaulting debtors by adding illegal costs and interest to their debts and that they had put this nefarious and oppressive scheme into effect for private gain in utter disregard of, and insult to, the principles of law and public justice.

The evidence disclosed that in 1955 Schwartz, then a constable, appointed Abraham Siegel as his deputy constable. In 1957 both were elected constables of Philadelphia's 49th Ward. In 1960 Schwartz was appointed as a magistrate and later duly elected as a magistrate in 1962. Siegel was re-elected constable in 1964 (R. 182a-188a).

At the time when Siegel first entered the picture in 1955, the then Constable Schwartz was also a sole proprietor carrying on a business of collecting debts under the trade name of Active Collection Agency (R. 190a). After he resigned as constable on December 29, 1960, having become a magistrate as of December 23, 1960 (R. 191a), there appeared a new corporation in Pennsylvania, the Active Collection Agency, Incorporated, whose business was collecting debts and whose president was Schwartz's wife and whose treasurer was Siegel (R. 193a). Mrs. Schwartz held 75% of the common stock and Siegel 25% (R. 225a).

The new corporation was a most successful enterprise. Its tax return for 1961 showed gross receipts of $48,574.83;

for 1964 $86,605.55. Mrs. Schwartz's income from the corporation rose from $5,200 in 1961 to $18,785.94 in 1964; Siegel's from $4,765.78 in 1961 to $15,462.28 in 1964 (R. 226a-230a).

Meanwhile, the thought had occurred to many citizens of Philadelphia that all was not well with the minor judiciary. An attempt to establish a special investigating grand jury foundered, *Smith v. Gallagher*, 408 Pa. 551 (1962), but eventually, in October, 1964 the Attorney General of the Commonwealth initiated his own investigation. During the course of that investigation the books and records of every one of the twenty-eight magistrates' courts were reviewed and depositions were taken of 26 of the 28 magistrates. Arrangements for these depositions were made through the Chief Magistrate and the Solicitor to the Board of Magistrates (R. 134a-135a).

It is not disputed that on January 25 and 26, 1965, agents of the Department of Justice and Special Assistant Attorneys General reviewed many records and papers in Magistrate Court No. 11, the court in which petitioner Schwartz presided. During that time, with the full knowledge of petitioner Schwartz and in the presence of his two clerks and a constable, agents of the Department of Justice made photostatic copies of certain jackets. These jackets were described at the hearing on petitioners' motions to suppress as envelopes on the outside of which are listed the number of a case filed in the court, the plaintiff and the defendant, the hearing date; inside the jacket any papers pertaining to the case are filed.

At trial, the magistrates' dockets, pertaining to the civil cases which were the subject of the suppression hearing, were produced. Examination of these dockets revealed that Magistrate Schwartz had failed to record the proceedings which occurred in those cases. As a result, the jackets contained the only record of the court's activity. The clerk of that court had been subpoenaed to produce the jackets themselves and he failed in most cases to do so. Therefore,

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the court admitted into evidence the photostatic copies which the Commonwealth had made (R. 603a).

Also at trial, certain admissions which Harry C. Schwartz had made during his unsworn testimony going to his wife's participation in Active Collection Agency and his benefit therefrom, were offered the accepted into evidence against him alone under the usual cautionary instructions (R. 804a).

It is also undisputed that on January 26, 1965, Magistrate Harry C. Schwartz gave unsworn testimony in response to questions asked of him by the attorneys for the Department of Justice. The deposition started as follows:

> May the record show that we are present in office of Magistrate Harry C. Schwartz on the southwest corner of 12th and Callowhill Streets, and present are Magistrate Schwartz, the court reporter, and myself (Arlen Specter), and in the outer office at the present time are Assistant Counsel, John P. Mason, and Edwin Naythons, and also Trooper Paul Barrouk, Special Agent Glen Johnston, Jr., who are examining the dockets and records. We are here today pursuant to arrangements set up by the Solicitor to the Board of Magistrates, and we are going to ask questions of Magistrate Schwartz in the same form that we have asked other Magistrates under an arrangement worked out between Chief Magistrate Walsh and my office in October, and this session will be unsworn, with my asking certain questions and inviting the responses of Magistrate Schwartz.

At the conclusion of the deposition, Magistrate Schwartz stated:

> Before you conclude may I say this to you, put this in the record.
>
> I just want it to be known that Mr. Specter and Mr. Mason have been most fair in the interrogation of myself . . .

The conspiracy proved at trial showed a predatory scheme whereby various creditors forwarded their small delinquent accounts to the Active Collection Agency for collection on a commission basis of twenty to twenty-five percent of the amounts collected (R. 199a-222a). None of the creditors authorized the collection of interest or, for that matter, any sums in excess of the principal sum to be collected (R. 211a, 303a).

In all the instances presented to the jury the Commonwealth proved that the Active Collection Agency added to the principal sum arbitrary interest amounts of either $1.50, $2.50, $3.50, or $4.50 and equally arbitrary and completely illegal costs of $7.50 or $9.00 and mileage for distances not travelled (R. 754a-800a, 844a-861a). In all these cases Magistrate Schwartz sat in judgment. Constable Siegel executed the judgments, often without a levy and, thus, the poor people dunned were finally compelled to pay amounts greatly in excess of what they legally owed. The creditors alone, of those upon whose lives the Active Collection Agency impinged were treated honestly. They got what they bargained for but did not share in the excess charges.

Upon proof of this vicious scheme by which magistrate and constable conspired to prey upon the poor debtors of Philadelphia, the jury found petitioners guilty upon all fourteen indictments.

Extensive motions for new trial or in arrest of judgment were filed, briefed and argued before a court en banc consisting of the trial judge and the Honorables Alexander F. Barbieri and Edmund B. Spaeth, Jr. The motions were denied and petitioners were sentenced to a total of 11 to 23 months in the Philadelphia County Prison and to pay a fine in the total amount of $10,000 for petitioner Schwartz and $5,000 for petitioner Siegel.

Petitioners thereupon appealed to the Superior Court of Pennsylvania which, after briefing and oral argument, affirmed by a vote of 6-0, one judge disqualifying himself.

Further appeal was sought and allowed by the Supreme Court of Pennsylvania. Again after further briefing and oral argument that Court affirmed. With respect to petitioner Schwartz, the vote was 5-1, with respect to petitioner Siegel the vote was 3-3. A petition for reargument was filed and answered and, on January 8, 1969, denied by the Supreme Court of Pennsylvania.

A petition for a writ of certiorari to the Supreme Court of Pennsylvania was thereupon filed and this response ordered by the Court.

ARGUMENT.

I. THE DECISION OF THE PENNSYLVANIA SUPREME COURT IS NOT CONTRARY TO THE DECISIONS OF THIS COURT IN BRUTON V. UNITED STATES AND ROBERTS V. RUSSELL.

Bruton v. United States, 391 U. S. 123 (1968) held that because of the substantial risk that a jury, despite instructions to the contrary, will look to incriminating extrajudicial statements of a co-defendant in determining another defendant's guilt, admission of the co-defendant's confession incriminating another defendant at their joint trial violates the second defendant's right of cross-examination secured by the confrontation clause of the sixth amendment. In *Roberts v. Russell*, 392 U. S. 293 (1968), this Court determined that the *Bruton* principle was applicable to the states through the fourteenth amendment and was retroactively applicable to trials conducted prior to *Bruton*.

Petitioner Siegel contends that the introduction of Schwartz's extrajudicial statement at petitioner's joint trial, during which Schwartz did not take the stand, was prejudicial to him in that it violated the principle enunci-

ated in *Bruton* and deprived him of due process of law guaranteed by the fourteenth amendment. Petitioner Schwartz also submits that he was deprived of due process by admission of his own statement.

The portions of Schwartz's transcribed statement which were read to the jury indicated that Schwartz was unsure whether Siegel had any stock in Active Collection Agency or what position Siegel held in the organization that Siegel's salary rose (from $50 per week) after Schwartz was appointed Magistrate that Siegel actually ran the business that Siegel got the Bell Telephone Company cases and, that it was Siegel's office that added on the interest to the claims, all matters overwhelmingly proven by other evidence. Petitioners would have this Court reverse their convictions on the ground that the introduction of this evidence to the jury "clearly had the effect of inculpating Constable Siegel in a conspiracy with Magistrate Schwartz as charged . . . and was obviously prejudicial to the conduct of his defense, despite the trial court's "instructions to the jury not to consider the statement with regard to Constable Siegel." This is simply not so. Even if the jury had failed to disregard Schwartz's allusion to Siegel, it can hardly be said that in the eyes of the jury Siegel was incriminated by this testimony.

Moreover, even if it was error to have admitted the statement, the error was harmless "beyond a reasonable doubt," under this Court's holding in *Chapman v. California*, 386 U. S. 18 (1966). This Court has recently held that a violation of the *Bruton* principle can be harmless error. *Harrington v. California*, —— U. S. ——, ——, 89 S. Ct. 1726, 1728, (1969). It was there held that apart from the confessions of two co-defendants, . . . "the case against Harrington was so overwhelming that we conclude that this violation of Bruton was harmless beyond a reasonable doubt."

Siegel was convicted of false pretenses in assessing certain charges in the execution of judgments entered against debtors by Schwartz in small claims brought before the

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Magistrate by Siegel and Active Collection Agency. (Indictments Nos. 893, 896, 989, 900). He was also convicted of conspiracy with Schwartz to commit various offenses related to the handling and disposition of the small claims (No. 880). The conspiracy conviction was based on the Act of June 24, 1939, P. L. 872, §302, 18 Pa. Stat. Ann. §4302, which provides:

> Any two or more persons who falsely and maliciously conspire and agree to cheat any person of his moneys, goods, chattels, or other property, or the prejudice of another, are guilty of conspiracy.

Where the conduct of the alleged conspirators indicates that they were acting together with a common, corrupt purpose, the jury may properly infer the existence of a conspiracy. *Commonwealth v. Albert,* 151 Pa. Superior Ct. 184 (1943); *Commonwealth v. Rosen,* 141 Pa. Superior Ct. 272, (1940). The facts Siegel may have had some stock in ACA, that his salary went up when Schwartz was appointed Magistrate in 1960, that he really ran the business, that he handled the Bell accounts, or that it was his office that added on the interest did not constitute evidence that Schwartz and Siegel were acting together with a common and corrupt purpose from which the jury might properly infer the existence of a conspiracy. None of these statements incriminated Siegel under the false pretense or conspiracy charge, because none of them indicated any impropriety on Siegel's part. To say the least, it is difficult to envision how the mere establishment of some relationship between Schwartz and Siegel (a relationship never concealed and readily proven by other evidence) made any contribution to Seigel's conviction.

The constitutional principle expounded in *Bruton* is not an empty shell. Rather, as indicated by this Court's holding in *Harrington,* it is a right which comes into play only after there is at least a reasonable possibility that the erroneously admitted statements may have incriminated the complaining defendant. It was decided in *Bruton* that the state's interest

in conducting joint trials to preserve economy, avoid delay, minimize the burden on witnesses, and the like, must not come at the expense of one of the defendant's constitutional rights. Respect for a citizen's constitutional safeguards, however, should not subvert a legitimate state interest by route of wild speculation. It should not do so here. Incriminating evidence against Siegel from other sources was overwhelming.

Thus, it was not Schwartz's statement which proved the existence of his sole proprietorship in the Active Collection Agency (R. 190a). Nor was it the statement that indicated that Siegel was first appointed deputy constable by the then constable Schwartz or that Siegel continued to work as a constable after Schwartz was elected to his post in the minor judiciary (R. 182a-188a). Schwartz in his statement was unclear whether Siegel had a stock interest in the corporate Active Collection Agency, but the record otherwise indicated clearly that he did have such an interest and that his income as recorded on the corporate tax returns mounted rapidly (R. 191a-193a, 225a-230a). As to the damaging and unlawful activities of Active Collection Agency, this was proved not by the Schwartz statement, but by the direct testimony of the victims of the scheme.

Thus, for example, the testimony of John Ford established that Siegel collected $38.96 from him as payment for his $14.36 debt to the Lavino Shipping Company (R. 272a-278a). The testimony of Mrs. Dolores Smith demonstrated that Siegel and Schwartz added an unauthorized $12.00 interest charge to her $48.00 telephone bill (R. 419a-425a). Another aggrieved Bell Telephone debtor was Gustav Huston who was compelled to pay $42.91 on his $37.91 debt (R. 461a). Similarly, the testimony of Mrs. Muriel Witts showed that Siegel collected $129.00 in satisfaction of her $105.00 debt owed to the J. C. Penny Company (R. 483a-490a). The testimony of 73-year-old Mrs. Anna Moyall showed that she was charged an unauthorized interest charge on her debt owed to the Savrin Coal and Coke Company (R. 549a-560a).

Again, Lawrence Crockin paid Siegel $31.00 to satisfy his $23.00 debt owed to the Atlantic Refining Company (R. 653a-655a).

It is clear then that the inference of Siegel's guilt was derived from the above type of damaging testimony rather than from Schwartz's statement concerning their association. Any remote possibility that Siegel was prejudiced by Schwartz's statement was sufficiently expunged by the charge of the court and, therefore, petitioner Siegel's right to due process of law under the fourteenth amendment has not been violated.

Petitioner Schwartz argues that he is also entitled to reversal under the *Bruton-Roberts* doctrine. He claims that under *Bruton* the state has a choice of conducting a joint trial and not introducing the statements of a co-defendant or conducting separate trials and introducing the statements. Since the Commonwealth did both, runs the argument, it gained the illegal advantage over Schwartz of the admissibility of the statement, "as well as the inferences resulting from the joint trial . . ."

The fallacy of this contention is that the Commonwealth has gained no illegal advantage over Schwartz. He has not been harmed and has no standing to object. *Bruton* only vindicates the right of a co-defendant who is denied the opportunity to confront his accuser via cross-examination. Since Schwartz's own confession was admitted, he was never in a position to demand cross-examination of "his accuser." Schwartz implicated himself and had the right to take the stand to deny his statement at any time. It is noteworthy that Schwartz's statements could have been admitted *against him* at a joint or a separate trial. And rather than having suffered from "the inferences resulting from the joint trial," the more reasonable supposition is that Schwartz could only profit from any possibility of transfering his guilt to Siegel and from the testimony of Siegel's defense witnesses.

II. THE DECISION OF THE PENNSYLVANIA SUPREME COURT IS NOT CONTRARY TO THE DECISION OF THIS COURT IN BOUIE V. CITY OF COLUMBIA.

The Supreme Court of Pennsylvania affirmed the conviction of Magistrate Schwartz on indictments charging him with committing the common law offenses of misbehavior in office (Nos. 881-882), official oppression (Nos. 881-883) and malfeasance (Nos. 881-885): ... by willfully, knowingly, and corruptly issuing civil summonses and sitting in judgment upon the civil cases set forth and at the dates set forth in the attached list, with the knowledge that his wife, Lillian Schwartz, was an officer and principal owner of the Active Collection Agency, Inc., which then and there was the collection agency or sub-agent of the various creditors of said claims, would obtain a direct pecuniary benefit from the results of the said cases by receiving a commission on all judgments and costs paid by the alleged debtors, and that he, therefore, would indirectly benefit thereby.

Petitioner Schwartz contends here, as he has throughout this litigation, "that Bills of Indictment Nos. 881-883 and 885 were unconstitutionally vague and indefinite and that his conviction thereon violated the due process and ex post facto clauses of the United States and federal constitutions." According to Petitioner Schwartz, there is no judicial precident in Pennsylvania prohibiting the conduct charged herein. It is his contention that since the state courts could find no established common law crime to fit the facts of this case, they retroactively created a new crime which did, thus violating the principles set down by this court in *Bouie v. City of Columbia,* 378 U. S. 347 (1964). The *Bouie* case held that "if a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect. Petitioner Schwartz contends that this principle "a fortiori" restricts the judicial creation of new common law crimes.

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Petitioner Schwartz's assertion that there is no exact precedent prohibiting his conduct demands too much of the common law and overlooks the fact that such conduct has always been a common law crime. *King v. Davis,* Lofft 63, (1772).

It is a general principle of Pennsylvania law that the common law remains in force unless abrogated by statute and an act not prohibited by statute may be indictable at common law. Section 1010 of the Pennsylvania Penal Code, 18 Pa. Stat. Ann. §5010, specifically provides that in Pennsylvania common law crimes remain in effect, that:

> every offense now punishable either by the statute or common law of this Commonwealth and not specifically provided for by this act shall continue to be an offense punishable as heretofore.

Moreover, although it is, of course, true that courts do not have the right to invent new crimes, they do have the right to ascertain and declare the common law, whether it be criminal or civil. *State v. Schleifer,* 99 Conn. 432, 121 Atl. 805 (1923). This is a necessary and expedient right because the common law is not an inflexible set of rules; the common law is compromised of fundamental principles and reasons, and a system of legal logic adapts them to varying circumstances. Here, the Pennsylvania state courts merely ascertained the common law and logically applied it to a specific pattern. That misbehavior in office, official oppression and malfeasance are and have always been common law crimes is readily apparent from a glance at Pennsylvania case law. Thus, *Commonwealth v. Evans,* 190 Pa. Superior Ct. 179, aff'd, 399 Pa. 387 (1959), defines the crime of *misbehavior in office* in detail:

> Misbehavior in office is a common law offense. *Commonwealth v. Brownmiller,* supra, 141 Pa. Superior Ct. 107, 120, 14 A. 2d 907. The offense occurs when there is a breach of a positive statutory duty or the performance by a public official of a discretionary set with an improper or corrupt motive ... In its penal sense, mis-

> behavior in office does not encompass mere errors in judgment or departures from sound discretion, but an official must perform those official duties which require the exercise of a sound discretion to the interest of the Commonwealth and not capriciously, arbitrarily, and with a willful and corrupt design ... The willful and corrupt motive need not arise from personal benefit.

Similarly, in *Commonwealth v. Miller*, 94 Pa. Superior Ct. 499, 507, 508 (1928), the defendant, a police captain, was indicted for *malfeasance* after directing that a charge against a criminal defendant be reduced. To the court,

> this amounted to no less than favoritism in the enforcement of the criminal law by one whose duty it was to enforce it impartially. Such an act strikes at the very fundations of our institutions.

The court commented on the nature of the offense:

> The offense of malfeasance in office is similar to common law extortion in some respects. Both offenses involve an abuse of public justice and both can be committed only by a public officer. Official oppression is a common law crime peculiarly applicable to magistrates. This crime is proscribed in Article I, Section 10 of the Pennsylvania Constitution which states that "No person shall, for any indictable offense, be proceeded against criminally by information, except ... or by leave of the court for oppression or misdemeanor in office." Blackstone, Book 4, Ch. 10 was quoted on the nature of these common law crimes in *Commonwealth v. McHale*, 97 Pa. 397 (1881):
>
> There is yet another offense against public justice, which is a crime of deep malignity; and so much the deeper, as there are many opportunities of putting it into practice and the power and wealth of the offenders may often deter the injured from a legal prosecution. This is the oppression and tyrannical partiality of judges, justices, and other magistrates

in the administration and under the colour of their office.

The recent case of *Commonwealth v. McKarski,* 208 Pa. Superior Ct. 376 (1966), reviewed a number of decisions of this state which define what a common law offense is:

In *Commonwealth v. McHale,* 97 Pa. 397, 408 (1881), the Supreme Court said . . ."We are of the opinion that all such crimes as especially affect public society are indictable at common law. The test is not whether precedent can be favored in the books, but whether they injuriously affect the public policy and economy."

In *Commonwealth v. Mochan,* 177 Pa. Superior Ct. 454, 458, 110 A. 2d 788 (1955), this court said: "Any act is indictable at common law which from its nature scandalously affects the morals or health of the community."

In *Commonwealth v. Miller,* 94 Pa. Superior Ct. 499, 507 (1928), it was said: "The common law is sufficiently broad to punish as a misdemeanor, although there may be no exact precedent, any act which directly injures or tends to injure the public to such extent as to require the state to interfere and punish the wrongdoer, as in the case of acts which injuriously affect public morality, or obstruct, or pervert public justice, or the administration of government."

In *Commonwealth v. Orris,* 136 Pa. Superior Ct. 137, 146, 7 A. 2d 88 (1939), it was said: "Among the offenses described as misdemeanors at common law are those less than felony, but such 'trespasses against good morals' as tent 'to outrage decency.' "

These principles are expressed in the common law crimes of misbehavior in office, malfeasance, and official oppression, crimes which, contrary to petitioner's contention, have been applied to specific conduct effectively identical to petitioner's. See, *e.g., Commonwealth v. Evans; Commonwealth v. Miller,* supra. Petitioner's demand for judicial precedent which explicitly prohibits a magistrate from continually dis-

posing of cases in which his wife has a direct and he himself an indirect interest in the outcome is a mockery and misunderstanding of the common law. It confuses the genus of the crime with its specie and would require a compendium of the infinite possibilities of factual circumstance from man's finite imagination. To say that this common law crime fails to gave a person of ordinary intelligence fair notice that his contemplated conduct is forbidden ignores the moral turpitude involved and the glaring fact that a magistrate is in a position where he is bound to know. Petitioner's position is like arguing that the Pennsylvania law prohibiting larceny does not give notice that it prohibits the theft of automobiles or airplanes because none of the common law decisions defining larceny concern those as yet uninvented objects.

Petitioner's contention fails for yet another reason. The ex post facto clause of the Constitution has always been a restraint solely on the legislative power. It was held by this Court in *Frank v. Mangum*, 237 U.S. 309, 344 (1915), that "... it is sufficient to say that the constitutional provision: 'No state shall ... pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts,' as its terms indicate, is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts." The *Bouie* decision merely extends application of the ex post facto clause to those situations where *legislation* receives an "unforseeable" and "indefensible" interpretation by a court. It does not extend application of the ex post facto clause to cases, such as the one under consideration, where no legislation is involved. Consequently, the decision of the Pennsylvania Supreme Court, even if it had not been supported by ample precedent, is not contrary to the decision in *Bouie v. City of Columbia*.

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III. THE AFFIRMANCE OF PETITIONER'S CONVICTION BY AN EQUALLY DIVIDED VOTE OF THE PENNSYLVANIA SUPREME COURT DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

It is a general principle that the right to appellate review is a privilege to be granted by the legislature. It must be granted or denied on a nondiscriminatory basis but need not be granted at all. See, *e.g.*, *Griffin v. Illinois*, 351 U. S. 12 (1956). The Pennsylvania legislature has, however, granted an appeal as of right to all persons convicted of the crimes charged in these indictments. That appeal is to the Superior Court of Pennsylvania and was exercised by both petitioners whose convictions were affirmed by a 6-0 vote of that court. The legislature has further provided that a second level of appeal may be sought by means of a petition of allowance of appeal from the Superior to the Supreme Court of Pennsylvania, a system resembling this Court's power to review the judgments of the federal courts of appeals on writ of certiorari. This second level of appeal was sought and review granted in this case. Argument was had before the full Supreme Court of Pennsylvania. Before the decision of this case, one of the justices who had heard argument died. Thereafter, the decision of the Superior Court was affirmed by the Supreme Court. One justice dissented as to both appellants and two additional justices dissented with respect to appellant Siegel. Thus, it is clear that petitioner Siegel's conviction, but not petitioner Schwartz's, was affirmed at the second level of appeal by an equally divided court.

Affirmances by an equally divided appellate court are, of course, common wherever an appellate court for any reason—death, disqualification, illness or absence of one or more judges or the creation of a court with an even number of judges, to suggest a few examples—cannot produce a majority either to reverse or affirm. Such affirmances occur

even in this Court and even in criminal cases presenting close and important constitutional questions. See, *e.g.*, *Biggers v. Tennessee*, 390 U. S. 404 (1968). Thus, there is no general constitutional prohibition against such affirmances.

The only possible constitutional question which might be presented by this issue, then, is whether this case represents a discriminatory application of the normal power to affirm by an equally divided court to the case against petitioner Siegel.

The Pennsylvania Legislature has provided that when a majority of Pennsylvania Supreme Court justices convene for a purpose agreeable to law, they have power to hold court. Act of April 14, 1834, P. L. 333, §2, 17 P. S. §10. The fact that Article V, §2, of the Pennsylvania Constitution provides that the Supreme Court "shall consist of seven judges" does not invalidate this legislative mandate. Article V, §2, merely creates a court of seven judges and does not purport to require a full court to conduct the business of the court. Moreover, the court has ruled that it has the power to continue to conduct its business despite the death of one of the justices provided a quorum remains. *Commonwealth v. Petrillo*, 340 Pa. 33 (1940). In fact, Mr. Justice Thompson ruled in *Commonwealth v. Mathues*, 210 Pa. 372, 422 (1904), that when only a single justice is not disqualified from sitting in a case, the whole power of the court devolves on that justice.

In accordance with normal procedure, the Pennsylvania Supreme Court has repeatedly handed down decisions by an equally divided court. See, *e.g.*, *Commonwealth v. Simon*, 432 Pa. 386 (1968); *Windisch v. Babcock and Wilcox*, 412 Pa. 558 (1963); *Ellis v. Dubin*, 396 Pa. 81 (1959). The rule, as that court said in the *Appeal of Madlum*, 103 Pa. 584 (1883), is: "The court was therefore equally divided, and the rule in such cases is that no valid order or decree can be made. If there is a motion before the court it falls. This is the rule everywhere, and it requires no argument to vindicate it. The only order we can make in such a case is to affirm the judgment or decree of the court below ... An affirmance

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here by a divided court means merely that the judgment or decree below cannot be disturbed."

Petitioners have been accorded a fair and impartial trial and review in two courts of Pennsylvania. Since review in the Pennsylvania appellate courts was fair and orderly and no substantive or procedural constitutional rights were violated, a decision by a divided supreme court has not denied them due process of law.

CONCLUSION.

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari to the Supreme Court of Pennsylvania be denied.

Respectfully submitted,

JAMES D. CRAWFORD,
Assistant District Attorney,
Chief, Appeals Division,
RICHARD A. SPRAGUE,
First Assistant District Attorney,
ARLEN SPECTER,
District Attorney.